CLERK'S COPY.

182

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PICOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1946
CERTIORARI GRANTED DECEMBER 9, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Northern District of California	1	1
Names and addresses of attorneys [omitted in printing]	1	1
Complaint	2	1
Exhibit A—Will of Alvina Wagner	6	3
Exhibit B—Petition for determination of heirship	7	4
Exhibit C—Vesting order No. 762 issued by Alien Property Custodian	10	5
Motion to strike complaint	15	8
Answer of defendant, The San Francisco Bank	16	9
Answer and cross-claim of defendants, Alvina Allen, et al	18	10
Notice of plaintiff's motion for judgment on the pleadings	25	14
Plaintiff's motion for judgment on the pleadings	26	14
Order for judgment	27	15
Opinion, Goodman, J	29	15
Judgment	40	21
Notice of entry of judgment	43	23
Notice of appeal	43	23
Designation of record on appeal	44	24
Statement of points to be relied upon, D. C. U. S.	45	24
Clerk's certificate [omitted in printing]	46	25
Designation of record and statement of points, U. S. C. C. A.	48	25

	Original	Print
Proceedings in U. S. C. C. A., Ninth Circuit	49	26
Order substituting party appellee	49	26
Order directing filing of mandate of Supreme Court of United States and resubmitting cause	51	27
Mandate of Supreme Court of the United States	52	27
Order directing filing of opinion and decree	54	28
Opinion, Wilbur, J.	55	29
Decree	70	41
Order denying petition for amendment of opinion	71	41
Order staying issuance of mandate	72	42
Clerk's certificate [omitted in printing]	73	42
Order allowing certiorari	74	42

(Names and addresses of attorneys omitted.)

In the Southern Division of the District Court of the United States for the Northern District of California

Civil Action File No. 22563–G

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, PLAINTIFF

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, RUDOLPH WAGNER, AND THE SAN FRANCISCO BANK, AS IT IS EXECUTOR OF THE WILL OF ALVINA WAGNER, DEFENDANT

Complaint

Filed April 6, 1943

1. This action arises under the Act of March 3, 1911; 36 Stat. 1091; U. S. Code, Title 28, Section 41 (1) and under the Act of October 6, 1917; 40 Stat. 425; U. S. Code, Title 50, Appendix, section 17; as hereinafter more fully appears.

2. The plaintiff is Alien Property Custodian.

3. The defendant The San Francisco Bank is a California banking corporation which has its principal place of business in San Francisco, California. It is executor of the will of Alvina Wagner, late of San Francisco, California, who died on or about June 6, 1942. That defendant will hereinafter be referred to as the "defendant executor." The will was admitted to probate on or about June 26, 1942 by the Superior Court of the State of California in and for the City and County of San Francisco. A copy of the will is attached hereto as Exhibit A.

4. The names and residences of the other defendants are as follows: Alvina Allen, Oakland, California, Gertrude Dinwiddie, Tarzana, California, Hilda Pigozzi, Oakland, California, Fred Wagner, Oakland, California, Paul Wagner, Oakland, California, and Rudolph Wagner, Pope Valley, California. Those six defendants will hereinafter be referred to as the "individual defendants."

5. The late Alvina Wagner left ten heirs at law surviving her. Six of those heirs at law are the individual defendants named in paragraph 4. The other four: Paula Knuppel, Olga Kruager, Fritz Wagner, and Paul Wagner, are all nationals of and residing in Germany.

6. On or about December 30, 1942 the individual defendants filed in the Superior Court of the State of California in and for

the city and county of San Francisco, a petition for determination of heirship. A copy of that petition is attached hereto as Exhibit B. That petition has not been heard, and no determination of heirship has been made,

7. On January 23, 1943, in compliance with law, the plaintiff issued Vesting Order No. 762. A copy thereof is attached hereto as Exhibit C.

8. The Vesting Order was filed with the Division of the Federal Register on January 27, 1943, and was published in 8 Federal Register 1252, all in compliance with law.

9. By virtue of the Vesting Order, the plaintiff became the owner of, and entitled to receive in distribution, the entire net estate of the late Alvina Wagner, after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent.

10. By virtue of the Vesting Order, the plaintiff became the owner of and entitled to receive in distribution, subject to payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, the real property now in possession of the San Francisco Bank, as it is executor of the Will of Alvina Wagner, decedent, which real property is more particularly described in paragraphs numbered 1, 2, 3 and 4 of page 2 (page 11 of this complaint) of said Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C," reference to which description is hereby made and made a part hereof as though fully set forth herein; all of said property being situated in the City and County of San Francisco, State of California.

Wherefore, the plaintiff demands that a judgment be entered (1) determining that the individual defendants are entitled to no part of the estate, (2) determining that the plaintiff is entitled to the entire net estate after payment of expenses of administration, inheritance and estate taxes if any, and debts of the decedent, (3) determining that the plaintiff is the owner of that certain real property which is more particularly described in paragraphs 1, 2, 3 and 4 of page 2 (page 11 of this compiaint) of Vesting Order No. 762, which is attached to this complaint and marked "Exhibit C," reference to which description is hereby made and made a part thereof as though fully set forth herein, subject to the payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent, and (4) ordering the defendant executor to pay the entire net estate to the plaintiff upon the allowance of its final account as executor.

(Signed) FRANK J. HENNESSY,
United States Attorney.

Address: 422 Post Office Building, San Francisco, Calif.

Of counsel
A. MATT WERNER,
General Counsel,
Office of Alien Property Custodian.
(Signed) GEORGE A. McNULTY,
Chief, Alien Property Unit, War Division.
Department of Justice, Washington, D. C.
(Signed) WALLACE H. WALKER,
Attorney, Alien Property Unit War Division.
Department of Justice, Washington, D. C.

6 *Exhibit A to complaint*

I, Alvina Wagner, a resident of San Francisco, California, do make, publish, and declare this to be my last Will and Testament, in the manner following, that is to say:

First. I give, bequeath and devise to my brother, Paul Wagner, my brother, Fritz Wagner, my sister, Olga Kruager and my niece, Paula Knuppel, all of my property, be it real or personal, wheresoever situate, of which I die possessed, and to share equally.

Second. In the event that my said niece, Paula Knuppel, predeceases me, then and in that event the share of my estate so bequeathed and devised to her, I hereby give, bequeath, and devise to her son (whose given name I do not know).

Third. I hereby nominate and appoint The San Francisco Bank, to act as Executor of this my last Will and Testament.

Fourth. I hereby revoke all former Wills by me made.

In witness whereof, I have hereunto set my hand and seal this 23rd day of December 1941.

(Signed) ALVINA WAGNER.

Witness:
(Signed) JOSEPH NUHN,
Residing at 3054 San Bruno Ave.,
San Francisco, Calif.

Witness:
(Signed) ALFRED VOYCE,
Residing at 1239 Polk Street,
San Francisco, California.

7 *Exhibit B to complaint*

In the Superior Court of the State of California
In and For the City and County of San Francisco

Probate No. 90121 Dept. Nine

IN THE MATTER OF THE ESTATE OF ALVINA WAGNER, SOMETIMES KNOWN AS ALVINE WAGNER, SOMETIMES KNOWN AS ALWINA WAGNER, SOMETIMES KNOWN AS ALWINE WAGNER, AND SOMETIMES KNOWN AS ALVINA T. WAGNER, DECEASED

To the Honorable Superior Court Aforesaid:

The petition of Rudolph Wagner, Paul Wagner, Alvina Allen, Fred Wagner, Gertrude Dinwiddie, and Hilda Pigozzi respectfully shows:

I

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner dies testate on the 6th day of June 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th day of June 1942, the San Francisco Bank was appointed by the aforesaid Superior Court, executor of the estate of said deceased, and that thereafter on said day it qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

8 II

That notice to creditors in the manner required by law has been given and the time to file and present claims against the estate has expired, but the estate is not in a condition to be closed.

III

That your petitioners are nephews and nieces of said decedent and are her heirs; that the other heirs of the said decedent are Paul Wagner, brother; and Fritz Wagner, brother; and Olga Kruager, sister, and Paula Kruppel, niece; that Paul Wagner, Fritz Wagner, Olga Kruager, and Paula Kruppel are citizens and residents of Halle, Germany, and as such not entitled to share in the estate of said decedent; that petitioners are entitled to have the whole of said estate distributed to them.

IV

That said estate consists of separate property, decedent being a single woman at the time of her death.

V

That the said property is described in the Inventory and Appraisement on file herein.

VI

That there are various persons who claim an interest in the estate of the deceased, and that the rights of such persons so claiming an interest in said estate have not been determined by any court of competent jurisdiction.

9 Wherefore, your petitioners pray that the court determine who are entitled to distribution of the Estate of Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner, deceased.

S. C. MASTERSON,
Attorney for Petitioners.

STATE OF CALIFORNIA,
County of Contra Costa, ss:

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Richmond, Contra Costa County, of California, and is the attorney for petitioners in the above-entitled action; that the petitioners are absent from the county wherein the affiant has his office and for that reason the affiant makes this verification on petitioners' behalf; that he has read the foregoing Petition and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON.

Subscribed and sworn to before me this 30th. day of December 1942.

[SEAL]

MABEL D. SOUSA,
Notary Public in and for the
County of Contra Costa, State of California.

10 *Exhibit C to complaint*

OFFICE OF ALIEN PROPERTY CUSTODIAN

WASHINGTON

Vesting Order Number 762

IN RE: ESTATE OF ALVINA WAGNER, DECEASED

(File D-28-4419; E. T. Sec. 1209)

Under the authority of the Trading with the Enemy Act as amended, Executive Order 9095 as amended, and pursuant to

law, the Alien Property Custodian after investigation, finding that—

(1) The property and interests described below in subparagraphs (a) and (b) are property which is in the process of administration by The Francisco Bank, Executor, 526 California Street, San Francisco, California, acting under the judicial supervision of the Superior Court of the State of California, in and for the City and County of San Francisco.

(2) Such property and interests are payable or deliverable to, or claimed by, nationals of a designated enemy country, Germany, namely: Fritz Wagner, Germany; Olga Krauger, Germany; Paula Knuppel, Germany; Paul Wagner, Germany.

11 (3) The property and interests described in subparagraph (b) are property within the United States owned or controlled by the aforesaid nationals of a designated enemy country, Germany; and Determining that—

(4) If such nationals are persons not within any designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, Germany; and

Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise, and deeming it necessary in the national interest,

Now, Therefore, the Alien Property Custodian hereby vests the following property and interests:

(a) All right, title, interest, and claim of any kind or character whatsoever of Fritz Wagner, Olga Grauger, Paula Knuppel, and Paul Wagner, and each of them, in and to the estate of Alvina Wagner, deceased; and

(b) All right, title, interest, and estate, both legal and equitable, of Fritz Wagner, Olga Kruager, Paula Knuppel, and Paul Wagner, and each of them, in and to the real property situated

12 in the City and County of San Francisco, State of California, and described as follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distance thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a Portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging.

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

13 Being a part of Outside Land Block No. 882. Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

14 Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and interests and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property and interests or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if any when it should be determined that such return should be made or such compensation should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC–1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Dated January 23, 1943.

[OFFICIAL SEAL] (Signed) Leo T. Crowley,
LEO T. CROWLEY,
Alien Property Custodian.

Certified to be a true copy of the original.

(Signed) Francis A. Mahony,
FRANCIS A. MAHONY,
Secretary,
Office of Alien Property Custodian.

[File endorsement omitted.]

In United States District Court

Motion to strike

Filed May 25, 1943

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, and move the Court for an Order to strike the complaint on file herein on the following ground:

That this Court has no jurisdiction over the subject matter in this action.

S. C. MASTERSON,
Attorney for Said Defendants:

337 Tenth Street, Richmond, California, Richmond 4161.

Copies mailed this date to:

(1) The San Francisco Bank, 526 California Street, San Francisco, California.

(2) Frank J. Hennessy, United States Attorney, 422 Post Office Building, San Francisco, California.

(3) A. Matt Werner, General Counsel, Office of Alien Property Custodian, Washington, D. C.

(4) George A. McNulty, Chief, Alien Property Unit, War Division, Department of Justice, Washington, D. C.

(5) Wallace H. Walker, Attorney, Alien Property Unit, War Division, Department of Justice, Washington, D. C.

Dated May 25, 1943.

S. C. MASTERSON.

[File endorsement omitted.]

In United States District Court

Answer of defendant, the San Francisco Bank

Filed May 28, 1943

The San Francisco Bank, one of the defendants in this action, answers the complaint as follows:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the complaint.

17 2. Answering the allegations of paragraphs 9 and 10 of the complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth thereof.

This defendant alleges further that the other defendants claim and assert that they are the owners of and entitled to distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, to the exclusion of plaintiff; that the claims of those defendants are adverse to and in conflict with the claim of plaintiff; that this defendant has no knowledge or belief which enables it to determine, and this defendant is unable to determine, whether in law and in fact plaintiff is the owner of and entitled to receive distribution of the net estate and the real property mentioned in paragraphs 9 and 10 of the complaint, respectively, or whether in law and in fact the other defendants are the owners thereof and entitled to receive distribution thereof.

Wherefore, this defendant prays that a judgment be entered (1) determining who, of the parties to this action, is the owner of and entitled to distribution of the net estate and the real property mentioned in the complaint, subject to the payment of expenses of administration, inheritance and estate taxes and debts of the decedent; (2) discharging this defendant from all liability except to the person or persons the court shall adjudge

18 to be owner or owners thereof and entitled to distribution thereof, and (3) directing and aiding this defendant in the premises.

JACKSON MADDUX,
Attorney for defendant The San Francisco Bank,
Executor of the Will of Alvina Wagner.

[File endorsement omitted.]

In United States District Court

Answer and cross-claim

Filed July 8, 1943

Come now the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner and answer the complaint on file herein as follows:

First Defense

I

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

I

That this Court has no jurisdiction over the subject matter in this action.

Third Defense

I

Defendants above-named admit the allegations contained in paragraphs 2, 3, 4, 5, and 6 of the complaint; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7 and 8 of the complaint; deny each and every other allegation contained in the complaint.

Cross-Claim

I

That Alvina Wagner, also known as Alvine Wagner, also known as Alwina Wagner, also known as Alwine Wagner, and also known as Alvina T. Wagner died testate on the 6th day of June 1942, in St. Helena, State of California, a resident of San Francisco, California; that subsequently such proceedings were had that on the 26th of June 1942, the San Francisco Bank was appointed by the Superior Court of the State of California In and For the City and County of San Francisco, executor of the estate of said deceased, and that thereafter on said day said San Francisco Bank qualified as said executor, and that it is now the duly qualified and acting executor of said estate.

II

That the Last Will and Testament of said Alvina Wagner was admitted to probate on June 26, 1942 in the Superior Court of the State of California In and For the City and County of San Francisco in that certain matter entitled "In the Matter of the Estate of Alvina Wagner" and given probate file number 90121; that in said Last Will and Testament said Alvina Wagner gave, bequeathed and devised all of her property to Paul Wagner, brother, Fritz Wagner, brother, Olga Kruager, sister, and Paula Knuppel, niece; that said persons survived said testator; that said persons are, and were at all times mentioned herein, citizens and residents of Germany.

III

That under the laws of the State of California said Paul Wagner, Fritz Wagner, Olga Kruager and Paula Knuppel are persons ineligible to take either real or personal property or the proceeds thereof by inheritance or testamentary disposition.

IV

That the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner and Rudolph Wagner are the heirs at law of said Alvina Wagner and under the laws of the State of California are entitled to the distribution of the whole of the estate of said Alvina Wagner.

V

That the estate of the said Alvina Wagner consists of the following property:

(a) Personal Property

Bank Deposits as follows:

The San Francisco Bank	$83.58
Bank of America	88.22
Wells-Fargo National Bank	27.06
1928 Hupmobile auto, value	15.00
Furniture at 834 Urbano Drive, San Francisco, California, value	250.00
Furniture at 7525 Geary Street, San Francisco, California, value	20.00
Silverware and Jewelry, value	125.00

(b) Real Property

All that real property situated in the City and County of San Francisco, State of California, and described as follows:

(1) Commencing at a point on the southerly line of Geary Boulevard, distant thereon one hundred four feet Easterly from the Easterly line of Fortieth Avenue and running thence Easterly and along the said Southerly line of Geary Boulevard twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle Westerly twenty-five feet and thence at a right angle Northerly one hundred feet to the Southerly line of Geary Boulevard and the point of commencement.

The same being a portion of Outside Land Block No. 245. Together with all improvements and appurtenances thereunto belonging.

(2) Commencing at a point on the Southerly line of Moraga Street, distant thereon fifty-seven feet six inches Easterly from the Easterly line of 23rd Avenue; running thence Easterly and along said line of Moraga Street twenty-five feet; thence at a right angle Southerly one hundred feet; thence at a right angle
22 Westerly twenty-five feet; thence at a right angle Northerly one hundred feet to the point of commencement.

Being a part of Outside Land Block No. 882.

Together with all improvements and appurtenances thereunto belonging.

(3) Beginning at a point on the Westerly line of 41st Avenue, distant thereon seventy-five feet Southerly from the Southerly line of Anza Street; running thence Southerly along said line of 41st Avenue twenty-five feet; thence at a right angle Westerly eighty-one feet six inches; thence at a right angle Northerly twenty-five feet; thence at a right angle Easterly eighty-one feet six inches to the point of beginning.

Being a portion of Outside Land Block No. 324. Together with all improvements and appurtenances thereunto belonging.

(4) Beginning at a point on the Westerly line of Seventeenth
a Avenue distant thereon three hundred and four feet Southerly from the Southerly line of Kirkham Street, formerly "K" Street, and running thence Southerly along said line of Seventeenth Avenue twenty-five feet; thence at right angles Westerly one hundred and twenty feet; thence at right angles Northerly
23 twenty-five feet; thence at right angles Easterly one hundred and twenty feet to the point of beginning.

Being a portion of Outside Land Block No. 785. Together with all improvements and appurtenances thereunto belonging.

Wherefore, defendants above-named pray judgment that plaintiff take nothing by his complaint; that the Court determine it has no jurisdiction over the subject matter herein; that the Court determine that the defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner

are entitled to distribution of the whole of the estate of said Alvina Wagner; and for such other and further relief as to the Court seems equitable.

S. C. MASTERSON,
Attorney for Defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.

STATE OF CALIFORNIA,
County of Contra Costa, ss:

S. C. Masterson, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California, and has his office in Richmond, Contra Costa County, California, and is the attorney for defendants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner in the above entitled action; that defendants are unable to make the verification because they are absent
24 from said county and for that reason affiant makes this verification on defendants' behalf; that he has read the foregoing Answer and Cross-Claim and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

S. C. MASTERSON.

Subscribed and sworn to before me this 7 day of July 1943.
[SEAL]
A. A. ALSTROM,
Notary Public in and for the County of Contra Costa, State of California.

Copies mailed to:
(1) Frank J. Hennessy, 422 Post Office Building, San Francisco, California, Attention: Wilber Mathewson.
(2) A. Matt Werner, General Counsel, Office of Alien Property Custodian, Washington, D. C.
(3) George A. McNulty, Chief, Alien Property Unit, War Division, Department of Justice, Washington, D. C., Attention: Wallace H. Walker.
(4) The San Francisco Bank, 526 California Street, San Francisco, California.

[File endorsement omitted.]

25 In United States District Court

Notice of motion for judgment

Filed July 26, 1943

To S. C. MASTERSON, Esq.,
Attorney at law, Room 105 Syndicate Bldg., 337 10th Street, Richmond, California:

JACKSON MADDUX, Esq.,
Attorney at law, 333 Montgomery Street, San Francisco, California:

ROBERT W. KENNY,
Attorney General for the State of California, State Building, San Francisco, California:

Please take notice that on Saturday, July 31, 1943, at the hour of 10:00 A. M. in the Courtroom of Judge Louis E. Goodman, Post Office Building, San Francisco, the plaintiff above-named will move the Honorable Court for judgment on the pleadings in the above-entitled case as against all of the defendants. A copy of the said Motion is enclosed herewith.

Dated July 24, 1943.

FRANK J. HENNESSY,
United States Attorney.
By W. E. LICKING,
Ass't U. S. Atty.

26 In United States District Court

Plaintiff's motion for judgment on the pleadings

Filed July 26, 1943

The plaintiff moves the court for judgment on the pleadings against all defendants herein.

FRANK J. HENNESSY,
United States Attorney,
7th and Mission Streets, San Francisco, California.
GEORGE A. McNULTY,
Chief, Alien Property Unit, War Division,
Department of Justice, Washington, D. C.
Attorneys for the plaintiff.

[File endorsement omitted.]

27 In United States District Court

Order for Judgment

November 17, 1943

The motion to strike complaint and the motion of the plaintiff for summary judgment having been heretofore heard and submitted, being now fully considered, and the Court having filed its written opinion thereon, it is Ordered, in accordance with said opinion, that the motion to strike the complaint be and the same is hereby denied; that the motion of the plaintiff for summary judgment be and the same is hereby granted, and that a decree be entered herein granting the relief prayed for by plaintiff.

29 In United States District Court.

Opinion

Filed Nov. 17, 1943

GOODMAN, District Judge.

Alvina Wagner, a resident of California, died June 6, 1942. By her last Will and Testament, dated December 23, 1941, and admitted to probate in the Superior Court of the State of California June 26, 1942, she bequeathed all her property, (several parcels of real property in San Francisco, California, and some personal property of minor value) to two brothers, one sister and one niece, all nationals and residents of Germany. Six nieces and nephews, residents of California, petitioned the Superior Court as heirs of decedent for distribution of the estate to them, claiming that the German legatees were ineligible as beneficiaries under Sections 259, 259.1 and 259.2 of the California Probate Code (effective July 1, 1941), which in substance provides that the right of aliens abroad to take real or personal property in the United States by will or descent, is conditioned upon the existence of a reciprocal right of Americans abroad and that such reciprocal right being absent, American heirs take. No determination of heirship has been made by the Superior Court.

On January 23, 1943, the plaintiff Alien Property
30 Custodian, under the authority of Section 5 (b) of the Trading with the Enemy Act, as amended by Title III of The First War Powers Act, 1941, and Executive Order 9095 of July 6, 1942, by vesting order 762, vested in himself for the use of the United States all the right, title, and interest of the German legatees in the estate of Alvina Wagner.

On April 6, 1943, plaintiff as Alien Property Custodian filed this action against The San Francisco Bank as executor of the Wagner Will and the six claimant heirs, for a judgment vesting ownership of the property of the estate, subject to the payment of administration expenses, inheritance and estate taxes and debts of decedent, in plaintiff and determining that defendant heirs have no right or claim thereto and ordering defendant executor to deliver over the net estate to plaintiff.

By separate answers, the defendant executor and the individual defendants claim lack of jurisdiction of this Court and allege that the individual defendants are entitled to inherit the property of the estate under California law. Defendants move to strike the complaint for lack of jurisdiction. Plaintiff moves for summary judgment in favor of plaintiff. *Both motions have been argued and submitted. All parties agree that no question of fact is involved and that the cause may be determined on the motions submitted.

The issues presented for determination are:

1. Has this court jurisdiction of the subject matter?

31 2. Is the cited California probate statute constitutional? If it is not, the property in probate should vest in plaintiff.

Plaintiff invokes the jurisdiction of this Court under 36 Stat. 1091; 28 U. S. C. A. 41(1), being "a suit of civil nature * * * in equity, brought by the United States or by any officer thereof authorized by law to sue," and the Trading with the Enemy Act (40 Stat. 411) 50 U. S. C. A. Appendix Sec. 17 (40 Stat. 425), whereby the District Courts "are given jurisdiction to make and enter * * * all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act."

Defendants and amici curiae claim lack of jurisdiction asserting the action is in rem to determine title to property and would oust the state court of previously acquired jurisdiction of the res. (citing U. S. v. Bank of New York Co. 296 U. S. 463.)

Section 5 (b), the pertinent provision of the Trading with the Enemy Act, provides as follows:

"During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise—

* * * * *

*Rule 56 Rules of Civil Procedure.

"B. investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use,
32 transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving any property in which any foreign country or a national thereof has an interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President; in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States. * * *"

The Trading with the Enemy Act was originally enacted October 6, 1917, c. 106, 40 Stat. 411, was twice amended in 1918 (40 Stat. 459; 40 Stat. 1020; again amended in 1919 (41 Stat. 35); again amended in 1920 (41 Stat. 977); again amended in May 1940 (54 Stat. 179) and once more on December 18, 1941 by the First War Powers Act (55 Stat. 839). It is strictly a war measure, finding its authority in Art. 1, § 8, Cl. 11 of the Constitution. Brown v. U. S., 8 Cranch 109; Miller v. U. S., 11 Wall. 268. By its terms, the President is granted wide authority to sequester, administer and dispose of alien enemy property in the United States and to proceed summarily and promptly to that end.
43 The judicial power, when properly invoked, under the Statute, should function in like manner.

Art. 1, sec. 8, cl. 11 of the Constitution empowers the Congress: "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." The powers granted to the President in the Trading with the Enemy Act include the power to make "captures" on land. The sequestering of alien enemy property under vesting orders by the Alien Property Custodian, who is the President's agent, is in the nature of a "capture" under Art. 1 sec 8 cl. 11 of the Constitution. Shoehr v. Wallace, 255 U. S. 239, 242.

The important question here presented is whether Federal jurisdiction in aid of the enforcement of this war statute, cannot be invoked because the property, sought to be vested, is in course of probate in the State court.

The jurisdiction of the Federal Courts is derived from the Constitution and Congressional enactments. It is not subject to restriction or ouster by State legislation e. g. State probate procedural statutes. (Miami County Natl. Bank v. Bancroft, 121 Fed. (2d) 921, 10 Cir.) Payne v. Hook, 7 Wall. 425.

It is clear to me that the Congress intended that alien property in the United States should be "frozen" wherever found and held and administered only in the interest of and for the benefit of the United States. A complete Federal dominance in every respect over alien rights and property, to the exclusion of
34 state or local agencies, was obviously purposed. Economic warfare, as an aid to the defeat of the enemy, can only be effective if it is centralized and possesses over-all control.

It follows that the Federal Courts, granted by the Congress the power to issue decree and process in aid of the statute, have jurisdiction to enforce by decree, vesting orders of the Alien Property Custodian.

It if appeared that the property bequeathed was unquestionably vested in United States citizens resident in California, then obviously there would be no basis for claiming Federal jurisdiction. Here, however, the validity of the State statute under which the California heirs make claim, is in issue and this, itself, furnishes the grounds for Federal jurisdiction.

The California statute (Probate Code 259, 259.1 and 259.2) reads:

"§ 259. Aliens residing abroad: Dependance of rights upon reciprocity. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are
35 inhabitants and citizens and upon the rights of citizens *and upon the rights of citizens* of the United States to receive by payment to them within the United States, or its territories money originating from the estates of persons dying within such foreign countries. (Added by Stats. 1941, Ch. 895 § 1; effective July 1, 1941.)

§ 259.1. Same: Burden of establishing that rights are reciprocal. The burden shal lbe upon such nonresident alies to establish the fact of existence of the reciprocal rights set forth in Section 259. (Added by Stats. 1941, Ch. 895, § 1; Effective July 1, 1941.)

"§ 259.2. Same: Disposition of property on finding of nonreciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property." (Added by Stats. 1941, ch. 895, § 1; Effective July 1, 1941.)

By the foregoing statute, California attempted to enter a field of exclusive Federal jurisdiction.

It is contended by defendants that the Probate Statute is a mere pronouncement of a rule of succession and testamentary disposition. That such is not the fact appears conclusively from the enabling clause which discloses the purpose of the statute to be:

"SEC. 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public
36 peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. *Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.*"

The emphasized portions of the above "purpose" clause disclose that the California State Legislature did not adopt the probate statute as an orthodox procedural rule to regulate succession to property in the ordinary course.

37 To the contrary, the expressed design was to fix a policy of international relations, which, the Legislature thought, would aid the United States in anticipated hostilities with a foreign government. If this were a valid exercise of state authority, by the same token, it could regulate aliens in other respects, by requiring registration, payment of fees, etc.—all matters within the exclusive Federal field (Hines v. Davidowitz, post.) Granted the patriotic impulse prompting the enactment of the State statute, nevertheless it invades the Federal field.

The Attorney General of California and other amici curiae argue that plaintiff's vesting order has no res to which to attach itself, inasmuch as under the California Probate Code, the title to the real estate involved is already vested in California heirs. If it appeared from the record that the title to the property was unquestionable, the point might be good. Here, however, the

property was willed to alien nationals, and, but for the cited probate section, would so pass.

The Attorney General contends that in determining the issue presented, this court unlawfully enters the domain of State probate procedure. I do not find this to be so. The relief besought asks no more than a determination vesting the interests of the aliens in the Alien Property Custodian. The State probate procedure itself is to be untouched. See Commonwealth v. Bradford, 297 U. S. 613.

The California statute is invalid and unconstitutional because the State of California attempted, by the probate statute
38 in question, to enter the field of foreign relations, a domain reserved exclusively to the Federal government, free from local interference. United States v. Curtiss-Wright Export Corporation, 299 U. S. 304; U. S. v. Belmont, 301 U. S. 324.

At the time the California statute was adopted (July 1941) there was in effect, between the United States and Germany, a treaty providing for reciprocity of inheritance rights between the two nations. (Treaty of Friendship, Commerce and Consular Rights, dated December 8, 1923; ratification exchanged October 14, 1925; proclaimed October 14, 1925; 44 Stat. (part 3) 2132).

Prior to the adoption of the California statute, the Congress had in May 1940 amended the Trading with the Enemy Act to provide for "freezing" control over financial transactions.

It is contended that the Treaty above referred to was abrogated by war (December 7, 1941) and hence California was free to enter the field. Head Money Cases, 112 U. S. 580; Society for Propogation of Gospel v. New Haven, 8 Wheat. 464. It is not beyond question that war did in fact abrogate the treaty. Assuming that it did, by the amendment of the Trading with the Enemy Act in May 1940, the Congress clearly evidenced the intent that the Federal Government should occupy the field to the exclusion of State or local legislation. In Hines v. Davidowitz, 312 U. S. 52, at 62, Mr. Justice Murphy clearly states that:

"When the national government by treaty or statute has
39 established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land * * * The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties * * * Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."

cf. Chy Lung v. Freeman, 92 U. S. 275, 279.

The Attorney General of California urges that the California Probate Court is a properly equipped and functioning court fully qualified to determine the questions presented in due course and that the Federal Court should "decline" jurisdiction. In view of what has been said infra re the authority and power granted to the President under the Trading with the Enemy Act and the mandate to the Federal Court to issue decrees and process in aid thereof, it is my view the jurisdiction should be exercised, not declined.

Neither a desire to deprive California heirs of property vesting in them under the existing California law nor a purpose to increase the holdings of plaintiff as Alien Property Custodian has any part in this decision. That California heirs, in preference
40 to alien enemies, cannot succeed to the property of this estate is perhaps regrettable. However, the decision herein must rest on broader grounds.

If the limitation of the powers of the state were not sustained in principle, evils now incapable of definition would result from state entry into the Federal field.

My conclusion is that this court has jurisdiction. Having jurisdiction, the court determines that the state probate act is unconstitutional, being an invasion of the Federal province.

The motion to strike the complaint is denied. The motion of the plaintiff for summary judgment is granted and a decree will enter granting the relief prayed for by plaintiff.

Dated November 17th, 1943.

In the Southern Division of the United States District Court for the Northern District of California

No. 22563–G

LEO T. CROWLEY, AS ALIEN PROPERTY CUSTODIAN, PLAINTIFF

vs.

ALVINA ALLEN, AND OTHERS, DEFENDANTS

Judgment

Filed Dec. 28, 1943

This cause came on to be heard on the plaintiff's motion for
41 judgment on the pleadings and on the motions of the defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner (which de-

fendants will, for convenience, be hereinafter designated as "the six defendant heirs") to strike the complaint and to dismiss the complaint, and was argued by counsel for the parties, and briefs were submitted by counsel for the parties and by various amici curiae. Upon consideration thereof it appears to the court that the plaintiff is entitled to judgment in his favor on the undisputed facts in the pleadings.

It is therefore ordered, adjudged and decreed as follows:

1. The plaintiff's motion for judgment on the pleadings is granted.

2. The motion of the six defendant heirs to strike the complaint is denied.

3. The motion of the six defendant heirs to dismiss the complaint is denied.

4. The provisions of California Statutes 1941, Chapter 895, which amended the California Probate Code by adding Sections 259, 259.1, and 259.2 contravene the provisions of Article I, Section 8, Clause 11 of the Constitution of the United States, and are therefore invalid.

5. That statute also invades, and interferes with the exercise of, the Federal Government's power over foreign affairs, and is therefore invalid.

6. The devises and legacies given by the will of Alvina Wagner, deceased, to Paula Knuppel, Olga Kruager, Fritz Wagner,
42 and Paul Wagner, are valid. Upon the death of that testatrix, title to her estate vested in those devisees and legatees, subject to administration and to the payment of expenses of adminisration, debts, and taxes.

7. By virtue of Vesting Order No. 762, issued by the plaintiff as Alien Property Custodian on January 23, 1943, the plaintiff acquired all right, title, interest and claim of the aforenamed devisees and legatees in and to the estate of the late Alvina Wagner.

8. None of the six individual defendants has any right, title or interest in or to the estate of the late Alvina Wagner.

9. The plaintiff is entitled to receive the net estate of the late Alvina Wagner in distribution, after the payment of expenses of administration, debts, and taxes.

Dated this 28th day of December 1943.

LOUIS GOODMAN, *District Judge.*

[File endorsement omitted.]

43 In United States District Court

Notice of entry of judgment

To FRANK J. HENNESSY, Esq.
GEO. A. MCNULTY, Esq.
WALLACE H. WALKER, Esq.
HARRY LEROY JONES, Esq.
A. MATT WERNER, Esq.
S. C. MASTERSON, Esq.
JACKSON MADDUX, Esq.
MATT WAHRHAFTIG, Esq.
H. W. FALK, Jr., Esq.
ROBERT W. KENNY, Esq., *Attorney General.*
R. A. WESTPHAL, Jr., Esq., *Deputy.*

You are hereby notified that on December 28, 1943, a Judgment was entered of record in this office in the above-entitled case.

G. W. GALBREATH,
Clerk, U. S. District Court.
lj.

SAN FRANCISCO, CALIFORNIA, *December 29, 1943.*
Notice Mailed of Entry of Judgment on Dec. 29, 1943.

In United States District Court

Notice of appeal to Circuit Court of Appeals

Filed March 27, 1944

Notice is hereby given that Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph
44 Wagner, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 28, 1943.

S. C. MASTERSON,
Attorney for Appellants, Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, 337 Tenth Street, Richmond, California.

[File endorsement omitted.]

In United States District Court

Designation of record on appeal

Filed March 27, 1944

The following is hereby designated as the record on appeal:

(1) Complaint and exhibits thereto.
(2) Defendant's Motion to Strike.
(3) Answer and Cross-Claim of Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner.
(4) Plaintiff's Motion for Judgment on Pleadings.
(5) Notice to Enter Judgment.
(6) The Opinion of Judge Goodman.
(7) The Judgment.
(8) Notice of Entry of Judgment.
(9) Notice of Appeal.
45 (10) Designation of Record on Appeal.
(11) Statement of Points.

S. C. MASTERSON,
Attorney for Defendants Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, Fred Wagner, Paul Wagner, and Rudolph Wagner, 337 Tenth Street, Richmond, California.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Statement of points

Filed March 27, 1944

The following is a statement of the points upon which the appellants intend to reply upon this appeal:

(1) That the Federal Court has no jurisdiction over the subject matter.

(2) That California Probate Code section 259; 259.1, and 259.2 are constitutional and valid and apply to the property involved herein.

(3) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany does not abrogate the right of the state of California to regulate succession and testamentary disposition of either (a) personal property or (b) real property.

(4) That the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany is either abrogated or suspended by war between the contracting powers.

46 (5) The California statute (Calif. Probate Code sec. 259) speaks as of the date of death of the testatrix and the non-resident alien enemies acquired no interest which the Alien Property Custodian could vest.

(6) That the Trading with the Enemy Act, as amended, and the Executive Orders made thereunder suspended the Treaty of Friendship, Commerce and Consular Rights of 1925 with Germany.

S. C. MASTERSON,
Attorney for Appellants,
337 Tenth Street, Richmond, California.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

48 In the Circuit Court of Appeals of the United States in and for the Ninth Circuit

No. 10760

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Adoption of designation of record and statement of points

Filed May 10, 1944

I hereby adopt the Designation of Record and Statement of Points filed in the District Court as a compliance with the provisions of Rule 19 of the Rules of this Court.

S. C. MASTERSON,
Attorney for Appellants,
337 Tenth Street, Richmond, California.

[File endorsement omitted.]

49 In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10760.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER AND RUDOLPH WAGNER, APPELLANTS

vs.

LEO T. CROWLEY, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Order of substitution of appellee

Filed August 17, 1944

Leo T. Crowley having resigned as Alien Property Custodian of the United States on March 27, 1944, and James E. Markham having succeeded to the office of Alien Property Custodian by appointment of the President on March 27, 1944, and having consented to his substitution as appellee in place of Leo T. Crowley,

It is hereby ordered this 17th day of August 1944, that James E. Markham as Alien Property Custodian be substituted as appellee in the place of said Leo T. Crowley.

CURTIS D. WILBUR,
Judge of the Above-Entitled Court.

We hereby consent to the making and entry of the foregoing order.

James E. Markham,
JAMES E. MARKHAM,
Alien Property Custodian of the United States,
Frank J. Hennessy;
FRANK J. HENNESSY,
United States Attorney,
W. E. Licking,
W. E. LICKING,
Assistant United States Attorney,
Attorneys for Plaintiff and Appellee.
S. C. Masterson,
S. C. MASTERSON,
Jackson Maddux,
JACKSON MADDUX,
Attorneys for Defendants and Appellants.

[File endorsement omitted.]

51 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order directing filing of mandate of Supreme Court of the United States, and resubmitting cause

March 12, 1946.

The mandate of the Supreme Court of the United States in above cause having been received, it is ordered that such mandate be forthwith filed by the clerk of this Court.

It is further ordered that this cause be, and hereby is resubmitted to the Court for consideration and decision, with leave to counsel for appellant to file a further brief, if so advised, within 20 days from date.

52 *Mandate of Supreme Court of the United States*

UNITED STATES OF AMERICA, *ss:*

The PRESIDENT OF THE UNITED STATES OF AMERICA,

[SEAL]

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, before you, or some of you, in a cause between Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al., Appellants, and James E. Markham, as He Is Alien Property Custodian, Appellee, No. 10760, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 24th day of January A. D. 1945, is in the following words, viz:

"This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the case," as by the inspection of the transcript of the record of the said Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court of Appeals, in this cause be, and the same is hereby, reversed;

53 And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court of Appeals for further proceedings in conformity with the opinion of this Court.

January 7, 1946

You, therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the fifteenth day of February, in the year of our Lord one thousand nine hundred and forty-six.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) Filed: March 12, 1946. Paul P. O'Brien, Clerk.

54 In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order directing filing of opinion and filing and recording of decree

May 22, 1946

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

55 In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10760—May 22, 1946

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER, APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Opinion

Filed May 22, 1946

Before: GARRECHT, STEPHENS and WILBUR, Circuit Judges

WILBUR, C. J.

This is an appeal from a judgment of the United States District Court of the Northern District, Southern Division of California, entered upon the pleadings. The action was brought by the Alien Property Custodian against six American heirs at law of Alvina Wagner, deceased, residents of California, who are appealing from the judgment against them. The controversy is over the right to the property left by Alvina Wagner, a resident of San Francisco, California, citizenship not alleged, who died June 6, 1942, in San Francisco, leaving real and personal property in California, which she devised and bequeathed, share and share alike, to her four relatives, who were residents and citizens of Germany, consisting of two brothers, a sister and a niece. The American heir claimants who were disinherited consisted of three nephews and three nieces. The will had no residuary disposal. The Alien Property Custodian claims that the will of the testatrix upon her death vested the property of the deceased in the German devisees and legatees named in the will, while the disinherited heirs claim that the will is ineffective because of the
56 alienage of the non-resident devisees and legatees. In short the appellants claim the property under the laws of succession of the State of California wherein the property is located, while the Alien Property Custodian claims that under the laws of the United States the property has vested in him. The Alien Property Custodian contends that the California Statute,

Chapter 895, California Statutes of 1941, Probate Code, §§ 259, 259.1, 259.2, which the California heirs rely upon, is void because in conflict with the Constitution of the United States in that it invades the field of foreign relations and war powers of the United States. The appellants on the other hand contend that Article IV of the German American Treaty of 1925 upon which the Alien Property Custodian relies was abrogated or suspended by the war with Germany, and also by the very same laws and proclamations upon which the Alien Property Custodian relies for his title.

The estate of the deceased herein involved is in due course under probate in the Superior Court in and for the city and county of San Francisco, California, wherein the will of the decedent has been probated and a proceeding in rem has been instituted by the California heirs to determine "who are entitled to distribution of the estate" in which "any person may appear and file a written statement setting forth his interest in the estate." When this suit was instituted in the District Court, the California heirs claimed that the California court sitting in probate had exclusive jurisdiction of the matter. The District Court sustained its jurisdiction, 52 F. Supp. 850, and without consideration of the merits of the case we reversed the District Court. 147 F. 2d 136. On certiorari, the Supreme Court sustained the jurisdiction of the District Court, — U. S. — (January 7, 1946), on the ground that the action was one of a kind within the equity jurisdiction of the English Court of Chancery in 1789, and hence was vested in the District Court by the Judiciary Act of 1789, now Judicial Code Section 24 (1) thereof, giving equity jurisdiction to the District Courts, and also by a special provision in the Trading With the Enemy Act § 17, giving such jurisdiction in matters arising under that Act.

The case was remanded to this court for decision upon the merits. A further statement of the admitted facts and of the proceedings involved in the controversy is necessary. In
37 1923, a treaty between the United States and Germany was negotiated and signed which was ratified and made effective on October 14, 1925. This treaty contained an agreement relating to reciprocal rights to inherit or take real and personal property of a decedent. (Treaty Article IV.) These provisions conformed in a general way to the provisions of the Treaty of 1828 with Prussia, 8 Stat. 378, 384, before World War I and to treaties entered into by the United States with other powers.

The conduct of the parties to the earlier treaty of 1828, during and after World War I is relevant to the interpretation of the similar treaty of 1925 under the conditions of World War II; hence

See footnotes on p. 39.

we state additional facts concerning World War I and its aftermath. On July 2, 1921, after the Armistice of November 11,
58 1918, but while we were still in a state of war with Germany, Congress passed a joint resolution (42 Stat. 106), providing that property of Germany or German Nationals seized or held or demanded by the United States or its officers on or after April 6, 1917, and similarly of Austria-Hungary on and after December 7, 1917, should be retained until disposed of as provided by law.[3]

59 This was followed by the Treaty of Berlin of 1921 which expressly ratified and adopted the provisions of the joint resolutions of July 2, 1921, supra. The Treaty of Versailles, section 289, also provided for revival of pre-war treaties at the

---

[1] The Trading with the Enemy Act (40 Stat. 411 enacted in 1917 was amended in 917, 40 Stat. 459, 460; in 1919 by 41 Stat. 35, 36; in 1920 by 41 Stat. 977; on May 1940, 54 Stat. 179; on December 17, 1941, 55 Stat. 839.

[2] The Treaty of 1925 with Germany, see 44 Stat. 2132, and Article IV thereof at page 2135; the Treaty of 1921 with Germany, see 42 Stat. 1939.

[3] Article IV of the Treaty of 1925 reads: "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein, would, by the laws of the country or a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, of whatsoever nationality, whether resident or nonresident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain and dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

[4] Section 5. All property of the Imperial German Government or its successor or successors, and of all German nationals which was, on April 6, 1917, in or since that date come into the possession or under the control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and all the Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under the control of, or has been subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

option of the victorious powers. Later, the Supreme Court in the case of Cummings v. Deutsche Bank, 300 U. S. 115 (1936), held that by reason of the first World War and the joint resolutions of Congress of 1921, supra, and the Treaty of Berlin ratifying the resolutions and the seizure of enemy property, the United States had become the absolute owner of the seized property of Germany and of German nationals.[4]

On July 28, 1941, the California legislature enacted a statute providing that the right of an alien nonresident to succeed to the property of a deceased person depended upon a reciprocal right in United States citizens.[5] At that time the German-American Treaty of 1925, Article IV, supra, was in effect, and similar treaties with all the principal powers were also in effect. This language of treaty concerning reciprocal rights was practically universal with only slight difference of phraseology.

60 Prior to our active participation in the Second World War, Congress and the President under the emergency provision of the Trading with the Enemy Act, had taken action. On May 7, 1940 (54 Stat. 179), Congress by joint resolution gave the President extensive powers "during time of war, or during any

---

[4] "By exertion of the war power, and untrammeled by the due process of just compensation clause, Congress enacted laws directing seizures, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of money and property seized and held by the Custodian under the Trading with the Enemy Act. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9–11. *Woodson* v. *Deutsche, etc. Vormals*, 292 U. S. 449, 454. The title acquired by the United States was absolute and unaffected by definition of duties and limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war." Quoted from *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120.

[5] "Chapter 3. Inheritance Rights of Aliens.

259. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from estates of persons dying within such foreign countries.

259.1. The burden shall be upon such nonresident aliens to establish the fact of existence of reciprocal rights set forth in Section 259.

259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

SEC. 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war use. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.

other period of national emergency" concerning transfer of property (amending subdivision (b) of Section 5 of the Act of October 6, 1917).

On April 10, 1940, the President had issued Executive Order 8389, which was ratified and confirmed by a joint resolution of May 7, 1940 (Section 2, Joint Resolution, 54 Stat. 179. On June 14, 1941, Executive Order 8389, supra, was modified. Further modifications were made after the United States entered the war December 8, 1941. (Executive Order December 9, 1941; Executive Order 8998 of December 26, 1941; The "First War Powers Act", an amendment of the Trading with the Enemy Act, 55 Stat. 838, 839. §§ 301, 302, 303, was enacted December 18, 1941;
61 Executive Order 9095 of March 11, 1942 providing for the office of Alien Property Custodian and fixing his powers and duties.)

This Executive Order 9095 provided in Section 3 as follows:

"3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct * * *"

On January 23, 1943, the Alien Property Custodian issued his so-called Vesting Order No. 762, purporting to vest in said Alien Property Custodian "all the right, title, interest and claim of the four German nationals in and to the estate of Alvina Wagner, deceased, and all the right, title and interest and estate of these German nationals in and to the decedent's real property in San Francisco."

The vesting order was filed with the Division of the Federal Register on January 27, 1943 and was published January 28, 1943 in 8 Fed. Reg. 1252. On April 6, 1943 the Alien Property Custodian filed his complaint in this action, in which he claimed to be the owner of all the estate of Alvina Wagner, deceased, by virtue of said vesting order, and demanding that the Superior Court in and for the City and County of San Francisco, California, sitting in probate to administer the estate of Alvina Wagner, deceased, distribute said property to him as owner thereof, as and when ready for distribution upon the settlement of the final account. This action in effect an action to quiet title of the Alien Property Custodian, was within the jurisdiction of the District Court (Markham v. Allen, — U. S. —, Jan. 7, 1946, supra). The District Court rendered judgment to that effect and the American heirs of Alvina Wagner appeal.

The appellants contend that the California Probate Code Sections 259, 259.1, and 259.2, quoted in full in footnote 5, supra, limit the right of nonresident aliens to take by will or by succession to those cases where reciprocal rights are extended to the

United States citizens by the country of their residence and that such limitation is within the legislative power of the State, and is valid. We will first address ourselves to this question.

62 Constitutionality of Sections 259, 259.1 and 259.2, Cal. Code, supra

The appellee claims that the provisions of the Probate Code of California, §§ 259, 259.1 and 259.2, dealing with reciprocal rights of nonresident aliens to land and personal property by inheritance or succession are void and unconstitutional because the California statutes apply in the domain of foreign affairs which is the exclusive prerogative of the Federal Government, and fully occupied by it.

The federal power invoked by the appellee is predicated upon the provisions of the Constitution vesting the treaty making power and war power, including the right of capture, in the Federal Government (Constitution, Article I, § 8, Clause 11), and the provisions of the Constitution which prohibit states from entering into treaties with other powers. (Constitution, United States, Article I, § 10.) It is claimed by the appellee that the power of the Federal Government to deal effectively with the rights of enemy aliens is interfered with and frustrated by the statute of California above cited. However, it is clear that the state has power to regulate the right of inheritance and succession and testamentary disposition of property within the state, Irving Trust Company v. Day, 314 U. S. 556, 562. The appellants claim that the power of the state government to make the right of nonresident aliens to succeed to property of the deceased depend on a reciprocal right on behalf of American citizens is a clear exercise of the right of the state to determine questions of inheritance, testamentary disposition and succession.

Assuming for the time, although this point is disputed,* that the Treaty of 1925, Article IV grants the reciprocal rights required by the provision of the California Probate Code under consideration, the requirement of reciprocity by the statute is only of importance if Article IV of the treaty is abrogated or suspended so that there is no longer any treaty provision to meet the condition of the California Probate Code requiring such reciproc-
63 ity. In that case the California statute, if valid, would deny rights of inheritance to the German nonresident

* The California statute requires that the proceeds derived from the sale of land provided for in Article IV of the Treaty and the personal property shall be received in the United States (see California Probate Code, § 1026, also 1060-1066).
There is also a question raised as to whether the nonresident alien can take personal property located within the United States.

aliens: It is to meet this situation that the appellee claims that the state statute is void because it violates the Constitution of the United States.

The appellee argues that the War Powers granted to the United States by the Constitution include by express provision (U. S. Constitution, Article I, Clause 10) the right to capture enemy property and that a state law which prevents or interferes with such capture is an interference with the power and is consequently void. The difficulty with this contention in the case at bar is the claim that the enemy alien has no right to the property. If the California statute is valid, it is not enemy property. The argument that the state should treat alien enemies more generously in order that the United States might seize their property and use it for its own purposes seems hardly valid as applied to constitutional power. The California statute does not apply to enemies only, but applies as well to any nonresident aliens, friends and allies as well as foes. Recent decision of the Supreme Court, Korematsu v. United States, 323 U. S. 214, 217; Hirabayashi v. United States, 320 U. S. 81, 89, concerning the war powers of the Federal Government show that the war power affects almost every field of private right on the basis of necessity. If this great reservoir of Federal power is ipso facto a denial of any power to the States in that reservoir, whether or not a war is being waged or such powers are being exercised, then the power of states is thrown into the utmost uncertainty and confusion.

It should be said in addition that the appellee relies upon a so-called emergency clause of the California Probate Code (California Statutes, 1941, Chapter 895, quoted in footnote 5) to show that the purpose of the California legislature was to prevent the export of money to foreign powers, which were seizing and diverting if not appropriating the property of citizens of California. It is said that this makes the California statute one of retribution and confiscation and thus within the domain of federal power over foreign affairs. The statute does not purport to be retributive and the addition of the emergency clause does not make it so. This emergency clause is required by the state constitution where a law is to take effect immediately rather than in 90 days, as would otherwise be the case. The motive of the legisture is not subject to judicial scrutiny, so long as the legislature acts within its
64 constitutional authority. (Amy v. Watertown, 130 U. S. 301, 319.) We conclude that the California statute is constitutional and valid.

Assuming as we have decided, that the statute of California in making the right of the nonresident German legatees and devisees depend upon a reciprocal right, we have need to consider whether

or not the Treaty of 1925 with Germany providing for reciprocity meets the requirements of the California statute. Before considering the exact language of the treaty, the effect of which is a subject of disagreement between the parties, we will consider the claim of the appellants that the treaty (Art. IV supra) in question was either abrogated or suspended during World War II.

War Abrogating Treaty

The question whether the outbreak of war abrogates wholly a treaty of peace, designed avowedly for a state of peace, is passed over as unnecessary and improper for discussion. Eminent authorities on international law agree that the stipulations of a treaty of peace are not all necessarily avoided or made inoperative by war. Those stipulations which are incompatible with existence of war, and those which war makes it impossible to carry into execution are avoided or become inoperative; others of such intrinsic nature as to be applicable and feasible in war may continue.[*] Accordingly, under those authorities it is sufficient to determine whether Article IV of that Treaty became inoperative on and after December 8, 1941, and thereby struck away the possibility that reciprocal rights of inheritance and testamentary succession existed between Germany and the United States and their resident nationals. The trial court in its opinion alludes to this ques-
65 tion but does not decide it nor base judgment upon any conclusion as to it, nevertheless it is implicit in any decision of the case.

By express terms of Article IV of the Treaty "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other." With respect to "real and other immovable property" or "interests within" one country devolving by the death of a national of the other, a national of one "were he not disqualified by the laws of the country where such property or interests therein is or are situated," "shall be allowed a term of three years in which to sell the same * * * without restraint or interference" and except from any duties or charges other than those which may be imposed on nationals of the country where the property "from which such proceeds may be drawn. Contrasted with this,

---

[*] V. Hackworth, International Law Digest, § 505, citing Karnuth v. Albro, 279 U. S. 231, 236; 5 Moore, International Law Digest, § 779, p. 383, quoting 1 Columbia Law Review, No. 4, pp. 209–223; 2 Oppenheim, International Law, § 99; Hall, International Law (8 Ed.) pp. 405, 453, 454, 457; and see Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166 with Note p. 180.

See also the following cases on the effect of war to render treaty stipulations inoperative: The Rapid, 20 Fed. Cases, pp. 297, 300, No. 11576; 1 Gall. 295; affirmed 8 Cranch 155; Jecker, Torrey & Co. v. Montgomery, 18 Howard (59 U. S.) 110, 112; United States v. Grossmayer, 9 Wall. (76 U. S.) 72, 75; Ross v. Jones, 22 Wall. (89 U. S.) 576, 586; Mayer v. Garvan, 278 Fed. 27, 32; Second Russian Ins. Co. v. Miller, 297 Fed. 404, 410; affirmed 268 U. S. 552.

from and after December 8, 1941 (before Alvina Wagner made her will) it has been unlawful for a German national to enter the United States, to have any communication of a business nature therewith, to remove property or money therefrom, and reciprocally unlawful for a national of the United States to have dealings or communications with one of Germany. No money or property could be taken out of this country to Germany or for its nationals. (See Trading With the Enemy Act §§ 7 (c, d) and 5, as amended by 55 Stat. 839.) In fact, even before there was war (December 8, 1941) Executive Order No. 8389 forbade monetary transmissals such as would have been necessary in case of a national of Germany selling real property pursuant to Article IV of the Treaty of 1925 and seeking to withdraw the money from the United States. [Many other countries than Germany were included in this order, which was made when the United States was not a belligerent.] But the Trading With the Enemy Act was broader and more severe, making it unlawful for the German legatees to be brought into the United States or to transmit communications to them (Trading With the Enemy Act § 3), or to have any form of business or commercial communications or intercourse with them (Trading With the Enemy Act §§ 2 and 3). They therefore could not come into the United States and as residents become eligible for naturalization or by treaty qualify (see California Alien Land Law §§ 1 and 2; Stat. 1921, p. lxxxiii, as amended 1923, 1927) to take land; they are incapable of taking by will because they are incapable of taking property by
66 law (See California Probate Code § 27); and they are incapable of "appearing and demanding" the property if it were distributed to them, either as legatees or as heirs, in consequence of which it must be distributed to the State of California for escheat, if there are no other qualified heirs (California Probate Code §§ 1026, 1027).*

These conditions are irreconcilable with Article IV of the Treaty of 1925, which under the rules above stated must therefore be regarded as inoperative since December 8, 1941.

However, basically the question of whether or not Article IV of the treaty remains in effect during the war depends upon the intent of the high contracting parties as expressed in the treaty, or as implied therefrom by the customary interpretation of such

---

*Calif. Prob. Code, § 1026 reads: "A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property."

Calif. Prob. Code, § 1027 in part reads: "If the court, at the time set for hearing of the final account, or such time thereafter to which the matter may be continued, does not distribute the entire balance of the estate remaining for distribution to known heirs, devisees, or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to known heirs, devisees or legatees."

agreements by nations generally. It is important therefore to consider the relation of the United States and Germany at the time the Treaty of 1925 was negotiated, and when ratified and confirmed in 1925, as indicating their intent. (As to previous treaties see discussion in footnote 8, supra.) This treaty was the result of the first World War, which had terminated so far as other powers were concerned by the Treaty of Versailles which the United States refused to join in. Congress in 1921 had passed a joint resolution approved July 2, 1921 (40 Stat. 106, supra), in effect appropriating or confiscating all property of Germany or German nationals "which was, on April, 1917, in or has since that date come into the possession or under the control of, or has been subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatever * * *." (See footnote No. 3.)

It provided that such property "shall be retained by the United States of America and no disposition thereof made, except
67 as shall have been heretofore *or specifically hereafter shall* be provided by law until such time as the Imperial German Government * * * or their successor or successors shall have respectively made suitable provisions for the satisfaction of all claims against said Governments respectively of all persons wheresoever domiciled who owe permanent allegiance to the United States of America, and who have suffered loss through the acts of the Imperial German Government * * *." Germany in the Treaty of Berlin of 1921 agreed with the United States to this treatment of Germany and German nationals and expressly ratified the same. The Supreme Court later (1936) in Cummings v. Deutsche Bank, 300 U. S. 115, supra, held the effect of this resolution and treaty of 1921 was to vest absolute title to such property in the United States. The Prussian treaty in effect at the time the United States declared war against Germany in World War I (April 6, 1917) concerning reciprocal rights of inheritance of citizens (Treaty with Prussia of May 1, 1828, Article XIV, 8 Stat. 378), was substantially the same as in the treaty with Germany or its successor negotiated in 1923, effective in 1925. As to the German Treaty in effect at the time the United States declared war against Germany in 1917, we have seizure of property authorized by the Trading With the Enemy Act, and its confiscation by the United States, and agreement thereto by Germany. Moreover, although not of controlling importance, we have a new treaty negotiated and entered into containing in Article IV, supra, the reciprocal rights provision which would have been unnecessary if such provisions were still in effect under the older treaty. The conduct of the two nations entering into the treaty of 1925 immediately prior thereto is not consistent with the idea that the high

contracting parties believed that the similar provision of the earlier treaty survived the impact of war, or that Article IV of the later treaty would survive another World War. There is not a single word that indicates that the parties believed that property inherited under the laws of the nation, was any more sacred, or any less likely to confiscation than any other alien owned property within the jurisdiction of the United States. In the teeth of this situation general statements of text writers, or of courts or judges, based upon the modern tendency to give greater consideration to private rights during war cannot have much weight. It was agreed in the Treaty of 1921 that with reference to treaty
68 rights under War I treaties, such private rights should give way to the needs or to the results of war.

In addition to the conclusions based upon the effect of World War I, upon the Prussian Treaty of 1828, we have the authorization in War Powers Act of 1941 (an amendment to the Trading With the Enemy Act, 55 Stat. 838, 837), to the President, "With respect to any property subject to the jurisdiction of the United States; and any property or interest of any foreign country or nationals thereof shall vest, when, as, and upon the terms directed by the President, in such agency or persons as may be directed by the President, in such agency or persons as may be designated from time to time by the President, and upon such terms as the President may prescribe such * * * property * * * shall be * * * dealt with * * * for the benefit of the United States." (Section 301, subsection (B)). The Act contains no hint or suggestion that property to be inherited after December 8, 1941 should not be subjected to confiscation although that which had been theretofore inherited, would be so subject. Thus Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision of the Treaty. To award the decedent's property to the Alien Property Custodian would be to give him a right in direct contradiction to the right of aliens under the Treaty which he contends is in full effect.

Amendment to California Law—Burden of Proof

The California statute under consideration (Sections 259, 259.1 and 259.2) provided in § 259.1 that the burden of proving the existence of reciprocal rights dealt with in Section 259 was upon the "nonresident alien." This section was amended in 1945 (Chapter 1160, California Laws, § 259, 1945) to provide that "It shall be presumed that such reciprocal rights exist and the presumption shall be conclusive unless prior to the hearing or any petition for distribution of all or a portion of such property to an

alien heir, devisee or legatee not residing in the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not, or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the non-
69 existence of such reciprocal right or rights shall be upon the petitioner. * * *"

The amendment was enacted after the decision of this court upon the appeal but before the decision of the Supreme Court on January 7, 1946. It is claimed by the appellee in the brief filed herein after the case was remanded to this court, that the amendment is applicable to the present appeal and requires affirmance.

The appellee's claim seems to be that the new law (California Probate Code, § 259, California Statutes 1945) holds the title in suspense until the nonresident alien acts and that during this interval the property tentatively rests in the German devisees and legatees and consequently is subject to seizure as their property before the procedure outlined by the California statute, to ascertain the rights of heirs, legatees and devisees.

It may take much time to determine who the heirs are, witness the Blythe case cited in the briefs, (Estate of Blythe, 110 Cal. 226; Blythe v. Hinckley, 180 U. S. 333), wherein the matter was in litigation for over 15 years. Nevertheless, when the will is proved, or the heirs ascertained, this title relates back to the death of the owner—there is no hiatus. Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349, and cases cited.

The Federal Court takes judicial notice of all treaties, and so does the state court. They do not have to be proved, consequently if the treaty grants reciprocal rights, there is no need of further proof. Whether it has been repealed or abrogated is also a subject of judicial notice.

It is conceivable that the foreign nation might without a treaty, and by its own statute grant rights which were in fact fully reciprocal, if this were done by statute, it would have to be proved, and what must be proved to sustain a complaint must be alleged. There is no such allegation here.

Reversed and remanded.

[File endorsement omitted.]

70 In United States Circuit Court of Appeals for the Ninth Circuit

No. 10760

ALVINA ALLEN ET AL., APPELLANTS

vs.

JAMES E. MARKHAM, AS HE IS ALIEN PROPERTY CUSTODIAN, APPELLEE

Decree

Filed and entered May 22, 1946

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court.

[File endorsement omitted.]

71 In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted.]

Order denying petition for amendment of opinion

July 17, 1946

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellee, filed June 19, 1946, for amendment of the opinion of this Court, heretofore filed on May 22, 1946, be, and hereby is denied.

72 In United States Circuit Court of Appeals for the Ninth Circuit

[File omitted.]

Order staying issuance of mandate

Filed July 19, 1946

Upon application of Frank J. Hennessy, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 22, 1946; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated San Francisco, California, July 19, 1946.

[File endorsement omitted.]

73 [Clerk's certificate to foregoing transcript omitted in printing.]

74 Supreme Court of the United States

No. 626, October Term, 1946

Order allowing certiorari

Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 51,490. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 626. Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, Petitioner vs. Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1946. Term No. 626, O. T. 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 18 1946
CHARLES ELMORE CROPLEY

No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1946

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaty and statutes involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	20
Appendix	21

CITATIONS

Cases:

Allen v. *Markham*, 147 F. 2d 136	5
Bevilacqua, Estate of 70 A. C. A. 679, 917	9
Blythe v. *Hinckley*, 180 U. S. 333	9
Brown v. *Peterson*, 185 Ia. 314	18
Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23	20
Chew Heong v. *United States*, 112 U. S. 536	12
Colson v. *Carlson*, 116 Kan. 593	17
Cook v. *United States*, 288 U. S. 102	12
Duus v. *Brown*, 245 U. S. 176	18
First National Bank v. *Henderson*, 101 Cal. 307	20
Flensburger Dampfercompagnie v. *United States*, 59 F. 2d 464	15
Freeman v. *Glenn County Telephone Co.*, 184 Cal. 508	20
Goos v. *Brocks*, 117 Neb. 750	10
Hauenstein v. *Lynham*, 100 U. S. 483	8, 17
Hines v. *Davidowitz*, 312 U. S. 52	8
Holmes v. *Jennison*, 14 Pet. 540	8
Irving Trust Co. v. *Day*, 314 U. S. 556	9
Jost v. *Jost*, 1 Mackey 487	18
Karnuth v. *United States*, 279 U. S. 231	9
Knutzen, Alfred Karl, Estate of, 70 A. C. A. 856	9, 17
Markham v. *Allen*, 326 U. S. 490	5
Olsson v. *Savage*, 119 Kan. 603	18
Pacific Gas etc. Co. v. *State of California*, 214 Cal. 369	20
People v. *Bank of San Luis Obispo*, 159 Cal. 65	20
People v. *Gerke and Clark*, 5 Cal. 381	17
People ex rel. Barlow v. *Curtis*, 50 N. Y. 321	8
Petersen v. *Iowa*, 245 U. S. 170	18
Schultze v. *Schultze*, 144 Ill. 290	17, 18
Skarderud v. *Tax Commission*, 245 U. S. 633	18

718325—46——1

Cases—Continued Page

Society for the Propagation of the Gospel v. *New Haven*, 8 Wheat. 464 9
Sophie Rickmers The, 45 F. 2d 413 15
State, ex rel. Miner v. *Reardon*, 120 Kan. 614 10
Re Stixrud, 58 Wash. 339 18
Sullivan v. *Kidd*, 254 U. S. 433 ..... 11, 17
Techt v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643 ..... 10, 17
Terrace v. *Thompson*, 263 U. S. 197 9
Trott v. *State*, 41 N. D. 614 18
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 8
United States v. *Rauscher*, 119 U. S. 407 8
United States v. *The Schooner Peggy*, 1 Cranch 103 20
Vandenbark v. *Owens-Illinois Co.*, 311 U. S. 538 20

Treaties:
Austria, May 8, 1848, Art. II, 9 Stat. 944, 945 ..... 10, 17
Brazil, December 12, 1828, Art. XI, 8 Stat. 390, 392 13
Denmark, April 26, 1826, Art. VII, 8 Stat. 340, 342, 11 Stat. 719, 720 18
Germany:
December 8, 1923, Art. IV, 44 Stat. 2132, 2135 ..... 5, 10, 11, 13, 16, 17, 21
Treaty of Berlin, 42 Stat. 1939 15
Great Britain, March 2, 1899, 31 Stat. 1939:
Art. I 13, 17
Art. II 13, 18
Hanseatic Republics, December 20, 1827, Art. VII, 8 Stat. 366, 370 17
Norway, June 5, 1928, Art. IV, 47 Stat. 2135, 2138 13
Prussia:
July 11, 1799, Art. XXIII, 8 Stat. 162, 174 13
May 1, 1828:
Art. XII, 8 Stat. 378, 384 13
Art. XIV, 8 Stat. 378, 384 ..... 10, 17
Spain, July 3, 1902, Art. III, 33 Stat. 2105, 2107 13
Sweden:
April 3, 1783, Art. VI, 8 Stat. 60, 64, 232, 240, 346, 354 18
June 1, 1910, Art. XIV, 37 Stat. 1479, 1488 18
Switzerland, November 25, 1850, Art. V, 11 Stat. 587, 590 ..... 17, 18

Federal Statutes:
Act of August 8, 1946, Public Law No. 671, 79th Cong., 2d Sess. 14
First War Powers Act, 1941, Title III, 55 Stat. 839:
Sec. 301, as amended 5, 12
Sec. 305 14
Joint Resolution of July 2, 1921, 42 Stat. 105 15
Public Law No. 322, 79th Cong., 2d Sess. 14

Federal statutes—Continued	Page
Settlement of War Claims Act of 1928, 45 Stat. 254, 270	14
Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App., Supp. V, 1 et seq.:	
Sec. 3	11
Sec. 5 (b)	5, 11, 12, 13, 14, 23
Sec. 32 (a)	14
Sec. 34	14
Winslow Act of March 4, 1923, 42 Stat. 1511	14, 16
State Statutes:	
3 Ariz. Code (1939), Sec. 39–111	7
California Statutes:	
1941, Chapter 895	3, 19
1945, Chapter 1160	5, 19, 22
California Probate Code (Deering's Calif. Codes Ann.):	
Sec. 259	3
Sec. 259, as amended	6, 19, 22
Sec. 259.1	3, 6, 19
2 Gen. Stats. Conn. (1930 Rev.), Sec. 5055	7
Laws of Mont. (1939), Chapter 104	7
2 Nev. Comp. Laws Supp. 1931–1941, Sec. 9894	7
5 Oregon Comp. Laws Ann. (1940), Sec. 61–107	7
1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, 177	7
Miscellaneous:	
Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended	7
Congressional Record:	
55 Cong. Rec. 4851, 65th Cong., 1st Sess.	13
61 Cong. Rec. 2510, 3283, 3298, 67th Cong., 1st Sess.	13
69 Cong. Rec. 882, 70th Cong., 1st Sess.	13
Gibson, *Aliens and the Law* (1940), Appendix B, Table 8, pp. 182–183	7, 13
Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess., p. 33	13
Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13496, 67th Cong., 4th Sess., pp. 40, 155, 181, 227	13
Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154	13
Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946), 34 Geo. L. J. 129	9

Miscellaneous—Continued Page

Letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945 ..... 6, 11, 16, 24

Letter from Secretary of State Kellogg to Congressman Rainey, October 23, 1926, Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property, 69th Cong., 1st Sess., p. 623 15

8 Op. A. G. 411 8

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 626

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, AND RUDOLPH WAGNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 29–40) is reported at 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 52–63) is reported at 156 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22,

1945 (R. 63–64). A petition for amendment of the opinion was denied by an order entered on July 17, 1946 (R. 64). On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until October 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 259 of the California Probate Code, as amended, is invalid as an invasion of the federal field of control over foreign affairs.

2. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the declaration of war with Germany or otherwise rendered inoperative, from that time, by the provisions of the Trading with the Enemy Act, as amended.

3. Whether Article IV of the Treaty overrides the California statute.

4. Whether Section 259 of the California Probate Code, as amended, if valid, imposes the burden of proof of the nonexistence of reciprocal inheritance rights upon those who invoke the Section to establish interests in an estate.

TREATY AND STATUTES INVOLVED

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. 21–23.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 2, 7). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942, in the Superior Court of the City and County of San Francisco (R. 3, 6–7). By this will, she bequeathed her entire estate, composed of real and personal property in San Francisco (R. 20–23), to four heirs-at-law, all residents and nationals of Germany (R. 3, 6, 8, 10–11). On December 30, 1942, six other heirs-at-law, residents of California, filed in the probate proceeding a petition for determination of heirship (R. 3, 7–9, 18), claiming that under Chapter 895 of California Statutes, 1941, the German legatees were ineligible as beneficiaries and that the California heirs should therefore inherit. There has never been a hearing on this petition.

Chapter 895 added to the California Probate Code a provision (Section 259) which conditioned the rights of aliens not residing in the United States to inherit property in California on the existence of reciprocal inheritance rights in American citizens in the country of which the alien is a resident, and upon the rights of American citizens to receive payment within the United States of moneys originating from estates of persons dying in such foreign country. Section 259.1, also enacted in 1941, placed upon the nonresident alien heirs the burden of establishing the existence of such reciprocal rights.

On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762, by which he vested in himself all right, title, and interest of the German legatees in the estate of Alvina Wagner, and specifically in the real property included in the estate (R. 10–15, 20–23). The Custodian thereafter instituted this action in the District Court of the United States for the Northern District of California against the executor and the six California heirs-at-law (R. 2–5). He sought a judgment determining, *inter alia,* that the California heirs have no interest in the estate and that the Custodian is entitled to the entire net estate after payment of expenses of administration, taxes, and debts, if any (R. 4–5).

The District Court granted the Custodian's motion for judgment on the pleadings (R. 27), holding that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 34), and that the California statute is invalid as an invasion of "the field of foreign relations, a domain reserved exclusively to the Federal government" and as an interference with the field of control of enemy property, fully occupied by the Trading with the Enemy Act, as amended (R. 37–38, 41). The court therefore decreed (R. 41–42) that the devises and legacies to the German heirs are valid, that upon the death of the testatrix her estate passed to the German heirs, subject to administration, and that by virtue of the Vesting Order the

Custodian acquired all the right, title, and interest of the German heirs in the estate.

The heirs appealed to the Circuit Court of Appeals for the Ninth Circuit which, without passing upon the merits of the Custodian's claim, reversed the judgment upon the ground that the district court was without jurisdiction of the subject matter of the action. *Allen* v. *Markham,* 147 F. 2d 136. On writ of certiorari, this Court reversed the judgment and remanded the case for disposition on the merits (R. 50–51). *Markham* v. *Allen,* 326 U. S. 490. The Circuit Court of Appeals again reversed the judgment of the District Court, holding that the California statute is constitutional as an exercise of the power of the State to regulate the succession to property (R. 57–58); that because the provisions of Article IV of the Treaty of 1923 with Germany (*infra,* p. 21) are irreconcilable with the Trading with the Enemy Act, the treaty provision became inoperative at the time of the declaration of the war; that such was the intention of the parties to the treaty; and that, moreover, Congress abrogated Article IV by enacting the First War Powers Act, 1941, which amended Section 5 (b) of the Trading with the Enemy Act (*infra,* p. 23) (R. 59–62).

During the time the case was pending in this Court the California statute was amended by California Statutes, 1945, Chapter 1160. Section

259.1 was repealed and Section 259 (*infra*, p. 22) was modified. The Circuit Court of Appeals held that the amended statute imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 62–63).

REASONS FOR GRANTING THE WRIT

1. *The issues are of national importance.*—The issues of federal law raised by this case are important for their bearing upon the exclusive control of foreign affairs by the Federal Government and upon the effect of the Trading with the Enemy Act, as amended, on existing treaties. In upholding the validity of the California statute, the Court below has condoned an interference by a State in the field of foreign affairs. The court has, moreover, held that the reciprocal inheritance provisions of our treaty of 1923 with Germany did not survive the war. This decision is inconsistent with the view of the Department of State (see letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 24–31), and until the question is decided by this Court the Government will be embarrassed in taking a position on the binding effect of the treaty. The court's conclusion that Congress intended, by the enactment of the First War Powers Act, 1941, to abrogate the treaty unsettles the law with respect to the abrogation of treaties by subsequent legislation. It rests on meager evidence which, if viewed as the court suggests, would also cast doubt upon the present effectiveness of other treaties.

Identical issues are involved in some 250 other estates in California in which the Custodian has issued vesting orders. Reciprocal inheritance statutes similar to the California statute here involved exist in five other states[1] and have been invoked in Montana, Nevada and Oregon to defeat vesting orders.

2. *The decision below is erroneous.*—a. The United States has concluded some seventy treaties containing a provision for reciprocal inheritance rights, of which eighteen were in force in 1940. These treaties are collected in Gibson, *Aliens and the Law* (1940), Appendix B, Table 8, pp. 182–183. Yet the California statute[2] (*infra*, p. 22) is

[1] Arizona, 3 Ariz. Code (1939), Sec. 39–111; Montana, Laws of Mont. (1939), ch. 104; Nevada, 2 Nev. Comp. Laws Supp. 1931–1941, Sec. 9894; Oregon, 5 Oregon Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, and 177. See also 2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055.

[2] It is here assumed that the statute as amended in 1945 (*infra*, p. 22) is applicable to this case. See *infra*, p. 20, n. 9. The original statute was even more plainly invalid. As enacted in 1941, the statute conditioned the rights of alien heirs not only on proof of reciprocal inheritance rights of United States citizens in the country of their residence but on the right of United States citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir. California Statutes, 1941, Chapter 895. The second condition was clearly invalid as a regulation of foreign commerce. It was, moreover, invalid for the additional reason that it sought to duplicate the federal program for the control of foreign funds. Executive Order No. 8389, April 10, 1940 (5 F. R. 1400), as amended.

in substance an invitation to foreign states to trade inheritance rights abroad for inheritance rights in California. If the foreign state grants American citizens the right to inherit abroad, the California legislature offers in return to grant residents of such states the right to inherit in California. The statute seeks to accomplish the same objective as do the existing reciprocal inheritance rights treaties—the grant by foreign states of the right of American citizens to inherit property abroad. The statute is, therefore, invalid as a duplication of the treaty-making program (*Hines* v. *Davidowitz*, 312 U. S. 52) and as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights. The power of the States severally to negotiate with foreign states never existed before (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–317), and plainly could not exist after, the adoption of the Constitution, which reserved the treaty-making power to the Federal Government and expressly forbade it to the States. *Hauenstein* v. *Lynham*, 100 U. S. 483, 490; 8 Op. A. G. 411, 415–416. *Cf. United States* v. *Rauscher*, 119 U. S. 407, 414; *Holmes* v. *Jennison*, 14 Pet. 540, 572; *People ex rel Barlow* v. *Curtis*, 50 N. Y. 321, 329.

The court below seems to have been of the view that California was not attempting to trade inheritance rights with foreign countries but was rather choosing to act as they did with respect to inheritance rights, and that this was no more than the

exercise of the State's undoubted power to regulate the succession to property (R. 57–58).[3] *Blythe* v. *Hinckley*, 180 U. S. 333, 341–342; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. California could admittedly deny all aliens the right to inherit. *Terrace* v. *Thompson*, 263 U. S. 197. The defect of this statute, however, is that it conditions that right on the extension of a specified privilege to American citizens by the alien's country. Such a privilege is unrelated to the legitimate benefits to California to be achieved by the exercise of the power over succession to property. The right of American citizens to inherit property abroad is a matter for international negotiation exclusively by the Federal Government and cannot be the objective of state action, or the condition on which a state will permit aliens to inherit.

b. Treaty provisions are no longer regarded as automatically abrogated by the outbreak of war between the signatory powers. In the absence of evidence of the intention of the parties, the test is the compatibility of the continued existence of the treaty clause with the state of hostilities. *Karnuth* v. *United States*, 279 U. S. 231; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 494. See Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946),

[3] Two decisions of intermediate courts in California, now pending in the Supreme Court of California after argument, are in accord. *Estate of Alfred Karl Knutzen*, 70 A. C. A. 856; *Estate of Bevilacqua*, 70 A. C. A. 679, 917.

34 Geo. L. J. 129. There is no inconsistency between a state of war and the inheritance of property by enemy citizens resident in the United States. Although war may make it impossible for nonresident enemies to realize upon their inheritances or to withdraw the proceeds, as provided for in the treaty, the actual acquisition of title by them is also not inconsistent with the state of hostilities, particularly since the Alien Property Custodian can represent the enemy or, as has been done in this case, vest his title and take in his place.

The appellate courts to which this problem was presented following the First World War held that treaty provisions, such as Article IV of the Treaty of December 8, 1923, with Germany (*infra*, p. 21), providing for reciprocal inheritance rights, survived the outbreak of war. The subject is exhaustively dealt with in an opinion by Judge Cardozo for the New York Court of Appeals in *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643, with respect to the reciprocal inheritance clause of the Treaty of May 8, 1848, with Austria (Art. II, 9 Stat. 944, and 945). In *Goos* v. *Brocks*, 117 Neb. 750, and *State, ex rel. Miner* v. *Reardon*, 120 Kan. 614, the Nebraska and Kansas courts held the provisions of the Treaty of May 1, 1828, with Prussia (Art. XIV, 8 Stat. 378, 384) to be effective after the declaration of war on Germany. The treaty provisions involved in these three cases are substan-

tially identical with Article IV of the 1923 treaty with Germany.

The Department of State, whose opinion on such a question is entitled to great weight (*Sullivan* v. *Kidd*, 254 U. S. 433, 442), has concluded that "there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war." (Letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 21, 27.)

Despite these authorities, the court below held that Article IV became inoperative on the declaration of war because of the provisions of the Trading with the Enemy Act. The first ground stated (R. 59–60) is that the rights granted by Article IV of the treaty are irreconcilable with those provisions of the Act which forbid the entry into this country of nonresident enemy heirs or their communicating with persons in the United States and which prevent the withdrawal of the proceeds of inheritances. The Act, however, is only incidentally related to inheritance and is not addressed to that problem. The restrictions on foreign heirs contained in the Act or the executive orders issued under it would largely have resulted from the state of war itself. Since the forbidden acts may be licensed (Sec. 3, 40 Stat. 412, 50 U. S. C. App. 3; Sec. 5 (b), as amended, *infra*, p. 23), there is no necessary inconsistency between the Act and the treaty. In any event, a treaty will not be deemed to have

been abrogated by a later statute unless an intention to abrogate has been clearly manifested by Congress. *Cook* v. *United States,* 288 U. S. 102, 120; *Chew Heong* v. *United States,* 112 U. S. 536. There is no manifestation of such an intention in this case.

The court below found such a congressional intention in the terms of the First War Powers Act, 1941, which amended Section 5 (b) of the Trading with the Enemy Act. As amended, Section 5 (b) authorizes the vesting of "any property or interest of any foreign country or national thereof" and the use of such property "in the interest of and for the benefit of the United States" (*infra,* p. 23). The court held that this grant of authority subjected inherited property to confiscation and thus "Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision of the Treaty" (R. 62). While it is correct to state that Congress ignored the reciprocal inheritance provisions of the treaty in passing the Act and the amendments thereto,[4]

[4] The legislative history of the Trading with the Enemy Act and its amendments gives no indication that Congress adverted to a possible relationship between the legislation and treaty provisions for reciprocal inheritance rights.

We have found no reference to the question of treaty obligations in the legislative history of the First War Powers Act, 1941, which extended the vesting power to foreign nationals.

The legislative history of the original Trading with the Enemy Act and its amendments is most voluminous. In

the proper conclusion is that Congress has thereby not shown an intention to abrogate the treaty provision. Section 5 (b) applies not only to the property of enemies but to the property of any foreign national. If this wide grant of authority shows an intention to abrogate Article IV of the treaty with Germany, that intention embraces as well the comparable clauses in our existing treaties with Great Britain (Art. I, II, March 2, 1899, 31 Stat. 1939), Norway (Art. IV, June 5, 1928, 47 Stat. 2135, 2138), Brazil (Art. XI, Dec. 12, 1828, 8 Stat. 390, 392), Spain (Art. III, July 3, 1902, 33 Stat. 2105, 2107) and other countries. See Gibson, *Aliens and the Law, supra,* pp. 182–183.

---

the course of discussions in the Congress there were many references to Article XXIII of the Treaty of July 11, 1799 with Prussia (as revived by Article XII of the Treaty of May 1, 1828, 8 Stat. 162, 174, 378, 384), which provided that in time of war the contracting parties would permit the merchants of the other party to leave the country with their possessions. *E. g.*, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess. p. 33; 55 Cong. Rec. 4851, 65th Cong., 1st Sess.; 61 Cong. Rec. 2510, 3283, 3298, 67th Cong., 1st Sess.; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13496, 67th Cong., 4th Sess. pp. 40, 155, 181, 227; 69 Cong. Rec. 882, 70th Cong. 1st Sess.; Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154. We have found no mention of the possible effect of the Act on Article XIV of the treaty of 1828, which provides for reciprocal inheritance rights (8 Stat. 378, 384).

718325 46—3

Section 5 (b) merely confers authority to vest property. Not until this authority is exercised can the statute be said to affect the rights of a German national protected by the treaty. And even the vesting of such a German's inheritance need not permanently deprive him of the benefits of it. The property may be applied to the payment of his debts (Sec. 34, added by Sec. 305, First War Powers Act, 1941, as amended by the Act of August 8, 1946, Public Law No. 671, 79th Cong. 2d Sess.) and it is possible that Congress may ultimately decide to return vested property or some part of it to the former owners.[5] Even if it could be said with complete certainty that the vesting order in this case will be followed neither by the return of the property nor its application to the debts of the former owners,

[5] Following the last war the major portion of the property seized under the Act was returned under Congressional direction. The Winslow Act of March 4, 1923 (42 Stat. 1511) provided for return to former owners of seized property up to $10,000. The return of an additional 80% of the property in excess of $10,000 was authorized by the provisions of the Settlement of War Claims Act of 1928 (45 Stat. 254, 270). The remaining 20% was retained by the United States as security for the payment by the German government of the awards of the Mixed Claims Commission.

With respect to property vested during this war Congress has recently granted authority which permits the return of property formerly owned by classes of persons not deemed hostile to the United States, including enemy nationals who have been the victims of political, racial or religious discrimination by the enemy. Sec. 32 (a), added by Public Law No. 322, 79th Cong., 2d Sess., and as amended by Sec. 2, Public Law No. 671, 79th Cong., 2d Sess.

the order cannot be taken retroactively to have undone the effect of the treaty, under which the alien heirs' rights became established at the death of the testatrix.

As a further ground for its decision, the court found in the Treaty of Berlin of 1921, restoring friendly relations with Germany (42 Stat. 1939)* (R. 61–62), an expression of an intent to suspend Article IV in time of war. That treaty ratified the right of the United States, reserved by the Joint Resolution of July 2, 1921, to retain seized German property until "suitable provision for the satisfaction" of war claims against the German Government should be made (42 Stat. 105, 106). The court adduced this provision to show that the parties to the treaty of 1923 believed

---

*The court suggested that further evidence of such an intention lies in the inclusion of Article IV in the treaty of 1923, a provision "which would have been unnecessary if such provisions were still in effect under the older treaty" (R. 61). The court is in error in assuming that the older treaty—the treaty of 1828—survived until the treaty of 1923. The treaty of 1828 was terminated through the failure of the United States to give the notice required by the Treaty of Berlin for its revival. *The Sophie Rickmers*, 45 F. 2d 413 (S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States*, 59 F. 2d 464, 470–471 (Ct. Cl.); letter from Secretary of State Kellogg to Congressman Rainey, October 23, 1926, set out in Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property, 69th Cong., 1st Sess., p. 623. Such terminations by a failure to revive under treaties of peace are, however, inconclusive as to the effectiveness of the treaty during the war. *The Sophie Rickmers*, *supra*, at p. 418.

that reciprocal inheritance provisions do not survive the outbreak of war. At the time of the signing of the treaty of 1923, however, Congress had already passed the Winslow Act, under which at least a partial return was made to most former owners (*supra*, n. 5). The Department of State has advised that although there does not appear to be any evidence of the actual intention of the parties to the 1923 treaty with respect to the present question, "in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war." (Letter from Acting Secretary of State Grew to the Attorney General, May 21, 1945, Appendix, pp. 24, 31.)

c. The court below did not reach the question of the construction of Article IV of the treaty of 1923, but rather assumed (R. 57) that the Article if effective, grants to the German heirs of Alvina Wagner the right to inherit both the realty and personalty in her estate. In this assumption, we believe the court was correct.

There can be little doubt that the first paragraph of Article IV (*infra,* p. 21), relating to realty grants to any German national, who would otherwise be disqualified by state law from inheriting,

the right to have the benefit of his inheritance through a sale and the withdrawal of the proceeds. A great number of courts, construing substantially identical treaty provisions, have so held. *E. g., Hauenstein* v. *Lynham,* 100 U. S. 483, 486–487 (Art. V, Treaty of Nov. 25, 1850 with Switzerland, 11 Stat. 587, 590); *Colson* v. *Carlson,* 116 Kan. 593 (Art. I, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939); *People* v. *Gerke and Clark,* 5 Cal. 381 (Art. XIV, Treaty of May 1, 1828 with Prussia, 8 Stat. 378, 384); *Schultze* v. *Schultze,* 144 Ill. 290 (Art. VII, Treaty of Dec. 20, 1827 with the Hanseatic Republics, 8 Stat. 366, 370); *Techt* v. *Hughes,* 229 N. Y. 222, certiorari denied, 254 U. S. 643 (Art. II, Treaty of May 8, 1848 with Austria, 9 Stat. 944, 945); *Sullivan* v. *Kidd,* 254 U. S. 433, *passim* (Treaty of March 2, 1899 with Great Britain, *supra*). The only decision to the contrary is one by the California District Court of Appeal, now pending in the Supreme Court of California after argument. *Estate of Alfred Karl Knutzen,* 70 A. C. A. 856. That case, involving Article IV of the treaty of 1923, is substantially identical with the instant one.

With respect to the second paragraph of Article IV of the treaty (*infra,* p. 21), which governs personalty, the argument has been made that it is applicable only if the decedent was an alien. It may be assumed for purposes of argument that

Alvina Wagner was not an alien.[7] We believe, however, that analysis of the cases construing the second paragraph establishes the error of any construction which makes citizenship of the decedent the controlling factor. *Re Stixrud,* 58 Wash. 339 (Art. VI, Treaty of April 3, 1783 with Sweden, as revived, 8 Stat. 60, 64, 232, 240, 346, 354); *Trott* v. *State,* 41 N. D. 614 (Art. II, Treaty of March 2, 1899 with Great Britain, 31 Stat. 1939); *Brown* v. *Peterson,* 185 Ia. 314 (Art. XIV, Treaty of June 1, 1910 with Sweden, 37 Stat. 1479, 1488); *Olsson* v. *Savage,* 119 Kan. 603 (Art. XIV, Treaty of June 1, 1910 with Sweden, *supra*); *Jost* v. *Jost,* 1 Mackey 487 (S. C. D. C.) (Art. V, Treaty of Nov. 25, 1850 with Switzerland, 11 Stat. 587, 590). See *Schultze* v. *Schultze,* 144 Ill. 290 (Art. V, Treaty of Nov. 25, 1850 with Switzerland, *supra*).

---

[7] The record does not disclose her citizenship.

[8] In *Petersen* v. *Iowa,* 245 U. S. 170, this Court held that Article VII of the Treaty of April 26, 1826 with Denmark, as renewed (8 Stat. 340, 342, 11 Stat. 719, 720) applied only where the decedent was an alien. That treaty, however, was written in terms of equality of taxation on property and *Petersen* v. *Iowa* is therefore not relevant here. This Court has held similarly in two companion cases to *Petersen* v. *Iowa,* involving the Treaty of April 3, 1783 with Sweden, as revived, *supra,* which is comparable to the instant treaty. *Duus* v. *Brown,* 245 U. S. 176; *Skarderud* v. *Tax Commission,* 245 U. S. 633. The *Duus* case, however, merely affirmed the decision below on the authority of *Petersen* v. *Iowa,* and in *Skarderud* v. *Tax Commission,* the affirmance *per curiam* was rested on *Duus* v. *Brown.* These three cases, moreover, were cases involving the validity of discriminatory inheritance

d. In the event that the California statute is found to be constitutional and not overridden by the treaty, the statute should properly be construed as imposing on the defendant heirs the burden of proof of the nonexistence of reciprocal rights. As enacted in 1941, Section 259.1 provided that "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259" (California Statutes, 1941, Chapter 895). Chapter 1160 of California Statutes, 1945, repealed Section 259.1 and amended Section 259 to provide, in part, as follows (*infra*, pp. 22–23):

> It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution * * * a petition is filed by any person interested in the estate requesting the court to find that * * * such reciprocal rights * * * do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal * * * rights shall be upon the petitioner.

The court below correctly assumed that this amendment, enacted pending the appeal herein,

---

taxes on personalty inherited by nonresident next of kin and, therefore, this Court was not presented with the question now raised—whether the realty and personalty provision of the treaty involved should be similarly construed, without regard to the citizenship of the ancestor.

is applicable to the case[9] and went on to hold that the burden of proving the existence of such rights is upon the Custodian (R. 63). In so holding, the court failed to follow the terms of the statute. The statute explicitly establishes a presumption that reciprocal rights exist; the burden of proving that such rights do not exist is imposed upon any person interested in the estate who desires to assume such a burden. The Custodian cannot be called upon to prove what is presumed by the statute itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

OCTOBER 1946.

---

[9] The California rule requires the application of new law existing at the time of decision by an appellate court. *First National Bank* v. *Henderson*, 101 Cal. 307; *Pacific Gas etc. Co.* v. *State of California*, 214 Cal. 369; *Freeman* v. *Glenn County Telephone Co.*, 184 Cal. 508. See *People* v. *Bank of San Luis Obispo*, 159 Cal. 65, 79–80. In this respect, the California courts have adopted the federal rule, as expressed in *United States* v. *The Schooner Peggy*, 1 Cranch 103, and recently approved by this Court. *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23.

APPENDIX

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal

property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of

all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Letter of the Acting Secretary of State to the Attorney General, dated May 21, 1945:

In reply refer to
Le 740.00113 EW
/4–1245

DEPARTMENT OF STATE,
Washington, May 21, 1945.

MY DEAR MR. ATTORNEY GENERAL: I refer to your letter of April 12, 1945 transmitting a copy of the appellee's brief in the case of *Allen et al.* v. *Markham, Alien Property Custodian,* pending before the United States Circuit Court of Appeals for the Ninth Circuit, in which you state that the Department of Justice is contending that the provisions of Articles I and IV of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed December 8, 1923, "have not been abrogated by the war, but are still effective". You inquire whether the Department of State concurs in the position which you are advancing on this point. * * *

It appears that the case relates to the inheritance of land in California from a decedent who died June 6, 1942, that the Alien Property Custodian has vested the interests in such land of certain German nationals resident in Germany, and that the Alien Property Custodian and the Department of Justice contend that provisions of Article IV of the Treaty remained in effect despite the outbreak of war and therefore entitled the German heirs to inherit the interest which has been vested by the Alien Property Custodian.

Article I of the Treaty covers a broad field, conferring upon nationals of each

High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.

It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled. As the Supreme Court stated in *Karnuth* v. *United States ex rel. Albro,* 279 U. S. 231, 236 (1929):

"The effect of war upon treaties is a subject in respect of which there are widely divergent opinions * * *. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making * * *".

Speaking through Judge Cardozo, the New York Court of Appeals said in *Techt* v. *Hughes,* 229 N. Y. 222, 240; 128 N. E. 185, 191 (1920, certiorari denied, 254 U. S. 643):

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came * * *. The writers of our own time reject these sweeping statements * * *. International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes

standards, but it does not fetter itself with rules".

After enumeration of various types of treaty provisions, Judge Cardozo added that the "principle or standard" is "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected". Judge Cardozo then pointed out the difference between the effect of war in giving the belligerent government the privilege of terminating the treaty provisions, and termination *ipso facto* by the outbreak of war. He reiterated that the function of the courts was "to determine whether, alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act" (128 N. E. 185, 192).

In *Karnuth* v. *United States ex rel. Albro, supra,* the Supreme Court appears to have applied a somewhat similar test, in holding that the War of 1812 had terminated the provision of Article III of the Jay Treaty conferring the right "freely to pass and repass" into the territories of the two parties on the American continent. Contrasting this provision with the right to hold lands and dispose thereof accorded under the Treaty of Peace of 1783 and confirmed by Article IX of the Jay Treaty, the court said:

"It is not permanent in its nature. It is wholly promissory and prospective and

necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility" (279 U. S. 231, 239).

In the *Sophie Rickmers*, 45 F. (2d) 413 (S. D. N. Y. 1930), Circuit Judge Julian Mack held that the outbreak of war in 1917 between the United States and Germany did not terminate or suspend the provision of Article II of the Treaty of Commerce and Navigation of 1828 between the United States and Prussia to the effect that Prussian vessels should be entitled to the same treatment as American vessels in matters of tonnage taxes. He quoted with approval Judge Cardozo's language in *Techt* v. *Hughes, supra*, and added:

"The criteria of judgment must then be pragmatic" (p. 419). Distinguishing the factual situation from that in the *Karnuth* case, *supra*, he said: "Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied" (p. 421).

Applying the principles of these decisions to Article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, et cetera. On the other hand, there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war.

A provision in a treaty with Austria-Hungary similar to Article IV was held effective during war time in *Techt* v. *Hughes, supra,* in which Judge Cardozo laid down the principle quoted and said:

"I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it. * * *

"The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. c. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations" (128 N. E. 185, 192). Referring to the statements that treaties of commerce were suspended or abrogated by war, he added:

"Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on guard against being misled by labels

* * *. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations" (*ibid.*, 193).

This case was followed in *State ex rel. Miner* v. *Reardon*, 120 Kans. 614, 245 Pac. 158 (1926), in which the court said with respect to a treaty provision that aliens might inherit:

"if it is to survive a declaration of war it must be upon other grounds; that is, an inference that it is intended to be enforced notwithstanding the parties are at war must be based upon different considerations. Upon the grounds indicated in the opinion in the Techt-Hughes Case we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace" (p. 159). The Supreme Court of Nebraska came to the same conclusion in *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13 (1929); in which the court said of a treaty provision regarding the disposition and inheritance of property:

"* * * the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war." (p. 16)

While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: * * * provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" (279 U. S. 231, 236–237).

Although Secretary of State Lansing wrote on September 10, 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary (1918 For. Rel. Supp. 2, p. 309), that statement was made prior to the judicial decisions discussed herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognizing greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

It may be observed that the courts of this country appear to have taken a position somewhat more favorable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among the modern writers there appears to be a trend in favor of the view that "the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the in-

tention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself." (Sir Cecil Hurst, "The Effect of War on Treaties," 1921–1922 British Year Book of International Law, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed. 1945) volume II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties*, 29 A. J. I. L. Supp. (1935), 1183 *et seq.* There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt* v. *Hughes, supra*, it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that Article IV of the Treaty of December 8, 1923 with Germany remains in effect despite the outbreak of war.

Sincerly yours,

JOSEPH C. GREW,
Acting Secretary.

The Honorable FRANCIS BIDDLE,
Attorney General

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Treaty and statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	7
Argument:	
I. Article IV of the Treaty of 1923 with Germany is controlling here, and sustains the Custodian's title to the estate involved	12
A. Article IV has continued in force during the present war	12
B. Under Article IV, the German nationals succeeded to their inheritance of personal as well as real property	28
II. Apart from Article IV of the Treaty, the California statute is invalid as an invasion of the Federal field of control over foreign affairs	68
III. If the California statute is valid the court below erred in holding that the Custodian has the burden of proof under it	75
Conclusion	81
Appendix A	82
Appendix B	85
Appendix C	93
Cases:	
Achille, Estate of Natale, Sup. Ct. Alameda Co., Calif., No. 89798, unreported	78
Adams v. *Akerlund*, 168 Ill. 632	41
Ahrens v. *Ahrens*, 144 Iowa 486	32
Allen v. *Markham*, 147 F. 2d 136, reversed, 326 U. S. 490	5
Arques v. *National Superior Co.*, 67 C. A. 2d 763	79
Bamforth v. *Ihmsen, Admr.*, 28 Wyo. 282	31
Bevilacqua, Estate of, 70 A. C. A. 679, 161 P. 2d 589	71, 78
Blak, Estate of, 65 C. A. 2d 232	73
Blythe v. *Hinckley*, 180 U. S. 333	32, 71
Bollermann v. *Blake*, 24 Hun 187, affirmed, 94 N. Y. 624	32
Brown v. *Peterson*, 185 Ia. 314	39
Brillhart v. *Excess Ins. Co.*, 316 U. S. 491	80
California Employ. Stabilization Comm. v. *Smileage Co.*, 68 C. A. 2d 249	79

Cases—Continued

	Page
Charlton v. *Kelly*, 229 U. S. 447	24
Chew Heong v. *United States*, 112 U. S. 536	23
Chy Lung v. *Freeman*, 92 U. S. 275	68, 72
Cities Service Co. v. *Dunlap*, 308 U. S. 208	76
Colson v. *Carlson*, 116 Kan. 593	31, 47
Cook v. *United States*, 288 U. S. 102	10, 22, 23
Corcoſingas, Estate of, 24 Cal. 2d 517	73
Crusius, Succession of, 19 La. Ann. 369	60
Cummings v. *Deutsche Bank*, 300 U. S. 115	26, 27
Dockstader v. *Kershaw*, 4 Pennewill (Del.) 398	31, 47
Doehrel v. *Hillmer*, 102 Ia. 169	34
Duus v. *Brown*, 245 U. S. 176	38, 39
Easterling Lumber Co. v. *Pierce*, 106 Miss. 672, affirmed 235 U. S. 380	80
Factor v. *Laubenheimer*, 290 U. S. 276	40
Fischer v. *Sklenar*, 101 Neb. 553	31
Flensburger Dampfercompagnie v. *United States*, 59 F. 2d 464, certiorari denied, 286 U. S. 564	26
Frederickson v. *Louisiana*, 23 How. 445	38, 54, 55, 56, 60, 63, 66
George E. Warren Corp. v. *United States*, 94 F. 2d 597	24
Giordano, Estate of, Sup. Ct., Fresno Co. Dept. 2, Calif., No. 19022, unreported	78
Goos v. *Brock*, 117 Neb. 750	13, 26, 31, 47
Griffin v. *McCoach*, 313 U. S. 498	80
Guaranty Trust Co. v. *York*, 326 U. S. 99	76
Hauenstein v. *Lynham*, 100 U. S. 483	28, 31, 67, 70
Head Money Cases, 112 U. S. 580	24
Henderson v. *Mayor of New York*, 92 U. S. 259	68, 72
Heron v. *Bray*, 122 C. A. 79	78
Hess, Estate of Paul, Sup. Ct. L. A. Co., Calif., No. 231375, unreported	78
Hines v. *Davidowitz*, 312 U. S. 52	70, 71, 72
Holmes v. *Jennison*, 14 Pet. 540	70
Irving Trust Co. v. *Day*, 314 U. S. 556	71
Johnson v. *Olson*, 92 Kan. 819	41
Jost v. *Jost*, 1 Mackey 487 (12 D. C.)	39, 62
Karnuth v. *United States*, 279 U. S. 231	12
Klaxon Co. v. *Stentor Co.*, 313 U. S. 487	80
Knutzen, Estate of Alfred Karl, 70 A. C. A. 856, 161 P. 2d 598	31, 71, 78
Kull v. *Kull*, 37 Hun (N. Y.) 476	32
Lehman v. *State*, 45 Ind. App. 330	31
MacArthur v. *Industrial Accident Comm.*, 220 Cal. 142	79
McKeown v. *Brown*, 167 Ia. 489	31
Markham v. *Kallimanis*, 327 U. S. 788	73
Miller v. *Clausen*, 229 Fed. 723, appeal dismissed, 269 U. S. 595	31, 32

Cases—Continued

	Page
Moynihan, In re, 172 Ia. 571	39
Murphy v. *Railroad*, 77 N. H. 573	80
Nielsen's Estate, Re, 165 P. 2d 792 (Mont.)	73, 74
Nielsen v. *Johnson*, 279 U. S. 47	34, 40
Olsson v. *Savage*, 119 Kan. 603	39
Opel v. *Shoup*, 100 Ia. 407	47
Palmer v. *Hoffman*, 318 U. S. 109	76
Pecheur Co. v. *Nat. Candy Co.*, 315 U. S. 666	80
People ex rel. Bartow v. *Curtis*, 50 N. Y. 321	70
People v. *Compagnie Generale Transatlantique*, 107 U. S. 59	68
People v. *Gerke and Clark*, 5 Cal. 381	31, 70
Perkins v. *Elg*, 307 U. S. 325	40
Petersen v. *Iowa*, 245 U. S. 170	38, 39
Pierson v. *Lawler*, 100 Neb. 783	31
Ripley v. *Sutherland*, 40 F. 2d 785, certiorari denied, 282 U. S. 865	31
Ross, In re, 140 U. S. 453	40
Roth, Estate of, Sup. Ct. L. A. Co., Calif., No. 220049, unreported	78
Sackheim v. *Pigueron*, 215 N. Y. 62	80
Sala, Succession of, 50 La. Ann. 1009	41, 63
Sampson v. *Channell*, 110 F. 2d 754	80
San Bernardino County v. *Industrial Accident Comm.* 217 Cal. 618	79
Scharpf v. *Schmidt*, 172 Ill. 255	31
Schulte v. *Schulte*, 144 Ill. 290	31, 32, 39
Skarderud v. *Tax Commission*, 245 U. S. 633	38, 39
Society for the Propagation of the Gospel v. *New Haven*, 8 Wheat. 464	12
The Sophie Rickmers, 45 F. 2d 413	12, 25, 26
Sour v. *Superior Court*, 1 Cal. 2d 542	78
Southern Indiana R. Co. v. *Peyton*, 157 Ind. 690	80
State ex rel. Miner v. *Reardon*, 120 Kan. 614	13, 31
Sternberg, Estate of Henry, Sup. Ct., L. A. Co., Calif., No. 282075, unreported	78
Stixrud, Re, 58 Wash. 336	39
Sullivan v. *Kidd*, 254 U. S. 433	25, 31
Techt v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643	13, 14, 16, 28, 31, 32, 47
Terlinden v. *Ames*, 184 U. S. 270	24
Terrace v. *Thompson*, 263 U. S. 197	71
Tevis v. *Pitcher*, 10 Cal. 465	79
Todok v. *Union State Bank*, 281 U. S. 449	41
Trott v. *State*, 41 N. D. 614	39
United States v. *Belmont*, 301 U. S. 324	71
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	70
United States v. *Pink*, 315 U. S. 203	71

Cases—Continued	Page
United States v. *Rauscher*, 119 U. S. 407	70
University v. *Miller*, 14 N. C. 188	41
Vanderbilt v. *All Persons, etc.*, 163 Cal. 507	80
Wallace v. *Western N. C. R. Co.*, 104 N. C. 442	80
Ware v. *Hylton*, 3 Dall. 199	28
Wieland v. *Renner*, 65 How. Pr. 245 (N. Y.)	32
Wilcke v. *Wilcke*, 102 Ia. 173	31
Wildenhus's Case, 120 U. S. 1	40
Statutes:	
First War Powers Act, 1941, 55 Stat. 839	20, 21
Joint Resolution No. 53, 48 Stat. 1267	27
Joint Resolution of July 2, 1921, 40 Stat. 105	26, 27
Public Law No. 322, 79th Cong., 2d Sess.	21
Public Law No. 671, 79th Cong., 2d Sess.	20, 21
Settlement of War Claims Act of 1928, 45 Stat. 254, 270	27
Trading with the Enemy Act, as amended, 40 Stat. 411, 50 U. S. C. App., Supp. IV, 1 et seq.:	
Sec. 2	19
Sec. 3	19
Sec. 5 (b), as amended	18, 19, 21, 22, 84
Sec. 9 (b), as amended	27
Sec. 32 (A), as amended	21
Sec. 34, as amended	20
Winslow Act of March 4, 1923, 42 Stat. 1511	27
3 Ariz. Code 1939, Sec. 39-111	69
California Statutes, 1941, c. 895	3, 68, 75
California Statutes, 1945, c. 1160	4, 68, 75, 83
California Probate Code:	
Sec. 259	3, 75
Sec. 259, as amended	76, 83
Sec. 259.1	3
2 Gen. Stats. of Conn. (1930 Rev.), Sec. 5055	69
1855 La. Acts 398, 399, Act 315, Sec. 7	55
1877 La. Acts 125, Act 86	63
1894 La. Acts 165, Act 130	63
4 Rev. Code Mont., 1939, Supp., Sec. 10333.2	69
2 Nev. Comp. Laws Supp. 1931-1941, Sec. 9894	69
Okla. Stats. Ann. Perm. Ed., Tit. 60, Sec. 1213	69
5 Ore. Comp. Laws Ann. (1940), Sec. 61-107	69
1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167, 177	69
Treaties:	
Austria:	
August 27, 1829, Art. XI, 8 Stat. 398, 401	51, 52, 54
May 8, 1848, Art. I, II, 9 Stat. 944	13, 31, 52, 54, 93
June 19, 1928, Art. IV, 47 Stat. 1876, 1879	94
Bavaria, January 21, 1845, Arts. II, III, 9 Stat. 826, 827	60, 93

Treaties—Continued Page
Bolivia, May 13, 1858, Art. XII, 12 Stat. 1003, 1010 93
Brazil, December 12, 1828, Art. XI, 8 Stat. 390, 392 22, 93
Brunswick and Luneberg, August 21, 1854, Arts. I, II, 11 Stat. 601 93
Canada, Oct. 21, 1921, 42 Stat. 2147 94
Central America, December 5, 1825, Art. XI, 8 Stat. 322, 326 93
Chile, May 16, 1832, Art. IX, 8 Stat. 434, 435 93
Columbia, October 3, 1824, Art. IX, 8 Stat. 306, 308 93
Danzig, March 9, 1934, 48 Stat. 1680 94
Denmark: April 26, 1826, Art. VII, 8 Stat. 340, 342, renewed April 11, 1857, Art. V, 11 Stat. 719, 720 38
Dominican Republic, February 8, 1867, Art. V, 15 Stat. 473, 476 93
Ecuador, June 13, 1839, Art. XII, 8 Stat. 534, 538 93
Esthonia, December 23, 1925, Art. IV, 44 Stat. 2379, 2380 94
Finland, February 13, 1934, Art. IV, 49 Stat. 2659, 2662 94
France, February 6, 1778, Art. XI, 8 Stat. 12, 18 40
Germany:
December 8, 1923, Art. IV, 44 Stat. 2132, 2135 7, 8, 10, 17, 28, 29, 32, 33, 36, 51, 66, 82, 94
Art. XIV 25
Treaty of Berlin, 42 Stat. 1939 25
Great Britain, March 2, 1899, Art. I, II, 31 Stat. 1939 22, 31, 39, 63, 65, 66, 93
Guatemala:
March 3, 1849, Art. XI, 10 Stat. 873, 877 93
August 27, 1901, Art. I, II, 32 Stat. 1944, 1945 93
Hanover:
May 20, 1840, Art. VII, 8 Stat. 552, 556 93
June 10, 1846, Art. X, 9 Stat. 857, 865 32, 93
Hanseatic Republics, December 20, 1827, Art. VII, 8 Stat. 366, 370 31, 39, 93
Hawaii, December 20, 1849, Art. VIII, 9 Stat. 977, 979 93
Hesse, March 26, 1844, Art. II, III, 9 Stat. 818 32, 93
Honduras, December 7, 1927, Art. IV, 45 Stat. 2618, 2620 94
Hungary, June 24, 1925, Art. IV, 44 Stat. 2441, 2443 94
Latvia, April 20, 1928, Art. IV, 45 Stat. 2641, 2642 94
Mecklenburg-Schwerin, December 9, 1847, Art. X, 9 Stat. 910, 918 93
Nassau, May 27, 1846, Art. II, III, 9 Stat. 849, 850 93
Netherlands, October 8, 1782, Art. VI, 8 Stat. 32, 36 41, 42
Nicaragua, June 21, 1867, Art. VIII, 15 Stat. 549, 553 93
Norway, June 5, 1928, Art. IV, 47 Stat. 2135, 2138 22, 94
Oldenburg, March 10, 1847, 9 Stat. 868 93
Orange Free State, December 22, 1871, Art. III, 18 Stat. 749, 750 93

Treaties—Continued Page

Perú, July 26, 1851, Art. XV, 10 Stat. 926, 932 93
Peru-Bolivian Federation, November 13, 1836, Art. VIII, 8 Stat. 487, 489 93
Poland, June 15, 1931, Art. IV, 48 Stat. 1507, 1510 94
Portugal, August 26, 1840, Art. XII, 8 Stat. 560, 566 93
Rrussia:
September 10, 1785, Art. X, 8 Stat. 84, 88 ..... 30, 33, 40, 44, 45, 93
July 11, 1799: Art. X, 8 Stat. 162, 166 ..... 33, 93
Art. XXIII, 8 Stat. 162, 174 21
May 1, 1828: Art. XII, 8 Stat. 378, 384 22
Art. XIV, 8 Stat. 378, 384 ..... 13, 22, 25, 31, 33, 93
Russia, December 18, 1832, Article X, 8 Stat. 444, 448 ..... 62, 93
El Salvador:
Dec. 6, 1870, Art. XXVIII, 18 Stat. 725, 738 93
February 22, 1926, Art. IV, 46 Stat. 2817, 2820 94
Sardinia, November 26, 1838, Art. XVIII, 8 Stat. 512, 520 93
Saxony, May 14, 1845, Arts. II, III, 9 Stat. 830 93
Spain:
October 27, 1795, Art XI, 8 Stat. 138, 144 93
July 3, 1902, Art. III, 33 Stat. 2105, 2107 ..... 22, 93
Sweden:
April 3, 1783, Art. VI, 8 Stat. 60, 64, revived September 4, 1816, Art. XII, 8 Stat. 232, 240, revived July 4, 1827, Art. XVII, 8 Stat. 346, 354 ..... 38, 39, 42
June 1, 1910, Art. XIV, 37 Stat. 1479, 1488 39
Swiss Confederation:
May 18, 1847, Arts. I & II, 9 Stat. 902 93
November 25, 1850, Art. V, 11 Stat. 587, 590 ..... 31, 39, 60, 62, 93
Venezuela:
Jan. 20, 1836, Art. XII, 8 Stat. 466, 470 93
Aug. 27, 1860, Art. V, 12 Stat. 1143, 1146 93
Wurttemberg, April 10, 1844:
Art. II, 8 Stat. 588 ..... 31, 93
Art III, 8 Stat. 588 ..... 55, 93

Miscellaneous:
Agreement between the United Kingdom, the United States of America, the U. S. S. R., and the Provisional Government of the French Republic, Berlin, Sept. 20, 1945, Sec. III, pars. 5, 6, Sec. VI, pars. 19 (b), 19 (c), *The Axis in Defeat*, State Dept. Pub. No. 2423, pp. 71, 72, 77 24
Annual Report of the Office of Alien Property Custodian for the Fiscal Year ending June 4, 1944, pp. 12, 131-132 19
Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873) 159 59
1 Butler, *Treaty Making Power in the United States* (1902), Sec. 153 34

Miscellaneous—Continued Page

2 Calvo, *Le Droit International* (5th ed. 1896), Sec. 526 ... 34

Congressional Record:

55: 4851 ... 21

61: 2510, 3283, 3298 ... 21

69: 882 ... 22

1 Curtis, *Constitutional History of the United States* (1889) 188-490 ... 41

Demangeat, *Histoire de la Condition Civile des Étrangers en France* (1844), p. 107 ... 34

Devlin, *Treaty Power* (1908), Sec. 229 ... 34

Despatch, Wheaton to Legaré, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives ... 49, 50, 51

Despatch, Bancroft to Fish, Nov. 29, 1869, 16 Despatches, Prussia, No. 52, MSS., Nat. Archives ... 59

2 *Diplomatic Correspondence of the United States, 1783–1789* (1833), 111, 116–117, 269, 274 ... 44, 45

Diplomatic Correspondence of the United States, 1868, Part II, 194, 196, 197 ... 61

2 Drafts of Treaties (Germany–1828) 233, MSS., Nat. Archives ... 33

Executive Order No. 8389, 5 F. R. 1400, as amended ... 19

Executive Order No. 9193, July 6, 1942, 7 F. R. 5205:

Sec. 2 ... 17

Sec. 5 ... 19

Executive Order No. 9788, Oct. 14, 1946, 11 F. R. 11981 ... 4

Fifteenth Census of the United States, 1930, Population, Vol. II, pp. 401–406 ... 37

Foreign Relations of the United States, 1880. 952, 953 ... 62

2 *Foreign Relations of the United States*, 1923, p. 24, 25, 28 ... 37

6 *Fuzier-Herman, Répertoire Générale Alphabétique du Droit Francaise* (1890) 358, Aubaine 6 ... 35

Gibson, *Aliens and the Law* (1940), Appendix B, Table 8, pp. 182–183 ... 34

5 Guyot, *Répertoire de Jurisprudence* (1784) Detraction 567 ... 34

Harvard Draft Convention on the Law of Treaties (1935) 29 Am. J. Int. L. Supp., Part III, pp. 1185–86 ... 12

Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess., p. 33 ... 21

Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 13496, 67th Cong. 4th Sess., pp. 40, 155, 181, 227 ... 21

Instruction, Seward to Bancroft, Aug. 18, 1868, 15 Instructions to Prussia No. 75, p. 2, MSS., Nat. Archives ... 59

Instruction, Fish to Bancroft, Dec. 21, 1869, 15 Instructions to Prussia No. 168, p. 99, MSS., Nat. Archives ... 59

Instruction, Fish to Bancroft, Jan. 24, 1871, 15 Instructions to Prussia, No. 193, p. 121, MSS., Nat. Archives ... 59

Miscellaneous—Continued Page

Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154 22

Journals of the Continental Congress:

XVIII (1910): 1205, 1209 42

XXII (1914): 374, 375–376, 393–396 41

XXIII (1914): 622, 623 41

XXIV (1922): 64, 65 41

XXVI (1928): 357, 360–361 44

2 *Kent's Commentaries*, Sec. 62 34

Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946) 34 Geo. L. J. 129 ..... 12, 26

Letter, Leopold Bierwith, Consul-General of Wurttemberg, to Secretary of State Seward, January 14, 1868, 11 Foreign Consuls in the U. S., MSS., Nat. Archives 57

Letter, Secretary of State Fish to Mr. Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U. S. 140, MSS., Nat. Archives 59, 60

Letter, British Ambassador Pauncefote to Secretary of State Olney, Sept. 24, 1895, 125 Notes from Great Britain, MSS., Nat. Archives 64

Letter, Sir Julian Pauncefote to Secretary Olney, Jan. 18, 1896, 126 Notes from Great Britain, MSS., Nat. Archives 65

Letter, Sir Julian Pauncefote to Secretary Olney, May 20, 1896, 126 Notes from Great Britain, MSS., Nat. Archives 65

Letter, Secretary of State Hay to Ambassador Pauncefote, Dec. 9, 1898, 24 Notes to Great Britain 541, MSS., Nat. Archives 65

Letter, Ambassador Pauncefote to Secretary of State Hay, Feb. 16, 1899, 130 Notes from Great Britain, MSS., Nat. Archives 65

Letter from Department of State, dated March 21, 1923, set out in *Goos* v. *Brocks*, 117 Neb. 750, 755–756 26

Letter, Secretary of State Hughes to Dr. Otto Wiedfeldt, the German Ambassador, July 25, 1923, Dept. State File No. 711.622/21a, MSS., Nat. Archives 37

Letter, Secretary of State Hughes to Alanson B. Houghton, American Minister at Berlin, August 23, 1923, Dept. State File No. 711.622/22a, MSS., Nat. Archives 37

Letter, Secretary of State Hughes to Senator Lodge, January 17, 1924, Dept. State File No. 711.622/36, MSS., Nat. Archives 33

Letter, Secretary of State Kellogg to Congressman Rainey, October 23, 1926, *Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property*, 69th Cong., 1st Sess., p. 623 26

Miscellaneous—Continued Page

Letter, Acting Secretary of State Grew to Attorney General Biddle, May 21, 1945 ..... 25, 28, 85

Miller, *Treaties and Other International Acts of the United States of America:*

2 (1931): 150 41

4 (1934): 546, 547–548 ..... 34, 48, 49, 51

5 (1937): 453, 456, 457, 458, 459, 460 ..... 52, 53, 54

4 Moore, *Digest of International Law* (1906) 6 63

116 Papers of the Continental Congress, MSS., Library of Congress:

Pp. 66, 74 45

P. 166 45

Report & Opinions of the Attorney General of Oregon, 1936–1938, p. 375 72

Report & Opinions of the Attorney General of Oregon, 1938–1940, pp. 22, 32, 93, 136, 173, 313 ..... 73, 74

Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland, State Dept. Pub. No. 2743 ..... 20, 26

Treaties in Force, A List of Treaties and Other International Acts in Force on December 31, 1941, State Dept. Pub. No. 2103 (1944) 94

2 Vattel, *Le Droit des Gens*, Sec. 112, Classics of International Law, Fenwick trans., p. 147 34

Wheaton, *International Law* (8th ed.), Sec. 82 34

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 15–21) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 29–40) is reported in 156 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 22, 1946 (R. 41). A petition for amendment of the opinion was denied by an order entered on July 17, 1946 (R. 41). On August 1, 1946, Mr. Chief Justice Vinson extended

the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was granted on December 9, 1946 (R. 42). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the declaration of war with Germany, or otherwise was rendered inoperative, from that time, by the provisions of the Trading with the Enemy Act, as amended.

2. Whether, despite the contrary provisions of Section 259 of the California Probate Code, the real and personal estate of the decedent passed to her German heirs under Article IV of the Treaty.

3. Whether, apart from its conflict with Article IV of the Treaty, Section 259 of the California Probate Code is invalid as an invasion of the Federal field of control over foreign affairs.

4. Whether Section 259 of the California Probate Code, if valid and applicable here, imposes the burden of proof of the nonexistence of reciprocal inheritance rights upon the respondents, who are invoking the Section to establish interests in an estate or upon the Custodian.

TREATY AND STATUTES INVOLVED

The pertinent portions of the Treaty and statutes involved are set out in Appendix A, pp. 82–84.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 1, 4). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942, in the Superior Court of the City and County of San Francisco (R. 1, 3, 4). By this will, she bequeathed her entire estate, composed of real and personal property in San Francisco (R. 11–12), to four heirs-at-law, all residents and nationals of Germany (R. 1, 3, 4, 6). On December 30, 1942, six other heirs-at-law, residents of California, filed in the probate proceedings a petition for determination of heirship (R. 1, 4–5), claiming that under Chapter 895 of California Statutes, 1941, the German legatees were ineligible as beneficiaries and that the California heirs should therefore inherit.

Chapter 895 added to the California Probate Code a new Section 259 which conditioned the rights of aliens not residing in the United States to inherit property in California upon (1) the existence of reciprocal inheritance rights in American citizens in the country of which the alien is a resident, and upon (2) the rights of American citizens to receive payment within the United States of moneys originating from estates of persons dying in such foreign country. Section 259.1, also enacted in Chapter 895, placed upon the nonresident alien heirs the burden of establishing the existence of such reciprocal rights. The condition with respect to receipt

of moneys in the United States was repealed by an amendatory statute, effective in 1945 while this case was pending (*infra*, p. 83). The amendatory statute also shifted the burden of proof, requiring the California claimants to prove the nonexistence of reciprocal inheritance rights.

There has never been a hearing on the petition for the determination of heirship filed in the probate court by the California heirs-at-law. On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762, by which he vested in himself all right, title, and interest of the German nationals in the estate of Alvina Wagner, and specifically in the real property included in the estate (R. 5–8, 11–12). The Custodian[1] thereafter instituted this action in the District Court of the United States for the Northern District of California against the executor and the six California heirs-at-law (R. 1–3). He sought a judgment determining, *inter alia*, that the California heirs have no interest in the estate and that the Custodian is entitled to the entire net estate after payment of expenses

[1] The Attorney General has succeeded to the functions of the Alien Property Custodian by virtue of Executive Order No. 9788 of October 14, 1946 (11 F. R. 11981). By order of this Court, the Attorney General was substituted for the Custodian as a party. Journal, Jan. 6, 1947. In this brief, we shall, however, refer to the petitioner, as well as his predecessor, as "the Custodian" throughout.

of administration, taxes, and debts, if any (R. 2).

The District Court granted the Custodian judgment on the pleadings (R. 14, 15), holding that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 18), and that the California statute is invalid as an invasion of "the field of foreign relations, a domain reserved exclusively to the Federal government" and as an interference with the field of control of enemy property, fully occupied by the Trading with the Enemy Act, as amended (R. 20, 22). The court therefore decreed (R. 21–22) that the devises and legacies to the German nationals are valid, that upon the death of the testatrix her estate passed to the German nationals, subject to administration, and that by virtue of the vesting order the Custodian acquired all the right, title, and interest of the German heirs in the estate.

The California heirs appealed to the Circuit Court of Appeals for the Ninth Circuit which, without passing upon the merits of the Custodian's claim, reversed the judgment upon the ground that the District Court was without jurisdiction of the subject matter of the action. *Allen* v. *Markham*, 147 F. 2d 136. On a writ of certiorari, this Court reversed the judgment and remanded the case for disposition on the merits (R. 27–28). *Markham* v. *Allen*, 326 U. S. 490. Thereafter, the Circuit Court of Appeals again

reversed the judgment of the District Court, holding that the California statute is constitutional as an exercise of the power of the State to regulate the succession to property (R. 34–35); that because the provisions of Article IV of the Treaty of 1923 with Germany are irreconcilable with the Trading with the Enemy Act, the treaty provision became inoperative at the time of the declaration of the war, and that such was the intention of the parties to the treaty (R. 36–39). The Circuit Court of Appeals also held that the California reciprocal inheritance statute, as it was amended while the case was last pending before this Court, imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 39–40).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the provisions of the Trading with the Enemy Act, as amended, are irreconcilable with Article IV of the Treaty of 1923 with Germany and that, therefore, the Article became inoperative on December 8, 1941.

2. In holding that the parties to the Treaty of 1923 intended that Article IV should not survive a war between them.

3. In holding that the Congress abrogated or suspended Article IV by enacting the First War Powers Act, 1941, amending Section 5 (b) of the Trading with the Enemy Act.

4. In holding that Section 259 of the California Probate Code, as amended, is not invalid as an invasion of the Federal field of control over foreign affairs.

5. In holding that under the 1945 amendment to the California statute, the burden of proof of the nonexistence of reciprocal inheritance rights is upon the Alien Property Custodian in this case.

6. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The ultimate question in this case is what the Alien Property Custodian acquired when he vested all right, title, and interest of the German nationals who were named in the will of Alvina Wagner as the beneficiaries of her estate. Since there is no dispute over the validity of the vesting order or the interpretation of the will, it is clear that the only impediment to the Custodian's acquiring the entire estate is the California statute, which purports to condition the right of aliens to inherit property in California upon the existence of reciprocal rights for American citizens in the country of the alien's residence. Our position is that the California statute is invalid, first, because as applied here it conflicts with the Treaty of 1923 with Germany, which has continued in force to date, and, independently, because it is an invasion of the field of foreign affairs exclusively reserved to the Federal Government.

735956—47——2

I

Article IV of the Treaty of 1923 between the United States and Germany provides, among other things, that nationals of Germany shall have the right to succeed by inheritance to property located within the United States. Since this treaty provision is presently effective as part of the supreme law of the land, the California statute, which would here operate as a condition upon the rights of the German nationals involved, must give way.

A

Article IV, we maintain, is presently in force, unaffected by the declaration of war on Germany or by the provisions of the Trading with the Enemy Act. There being no evidence of an intention that the treaty be abrogated in the event of war between the parties, we are remitted to the rule established by this Court—that war abrogates only those treaty provisions whose continued existence is incompatible with the state of hostilities. The essential feature of Article IV, the succession by German nationals to interests in decedents' estates, is not incompatible with the state of hostilities and could not prejudice our national security. Such danger to us as might arise relates to the possibility that the Germans could realize upon their interests, a possibility which is averted by the Trading with the Enemy Act. That Act itself, however, is neither irreconcilable

with the continued existence of a right of inheritance by German nationals nor does it otherwise abrogate or suspend the treaty provision. While the Act may have the effect of forbidding the entry of Germans into the country, its provisions do not make it impossible for the heir to succeed to ownership. The Custodian is empowered to represent such an enemy heir and, where necessary, to license any acts or transactions forbidden by the statute. Nor is the right to inherit property inconsistent with the existence of a power to vest inheritances; the two are rather complementary since it is only where the right exists that the power to vest the inherited property may be exercised. Moreover, it is neither inevitable that the power to vest will be exercised, nor that, once it is, all benefits of the inheritance will be irretrievably lost to the former German owner. The property will be applied to such claims as exist against the German and it is not impossible that further provisions of advantage to some classes of former owners of vested property will be made.

The court below held that Congress, in amending the Act in 1941 to confer the broad power to vest the property of any foreign national, ignored the treaty provision and thereby abrogated it. The failure of Congress to take notice of a treaty provision, on the contrary, has been held to establish that there was *no* intention to

abrogate. *Cook* v. *United States*, 288 U. S. 102, 120. The court below also relied on the relationships between the United States and Germany in 1923, the time the treaty was signed, as showing an understanding that Article IV would not survive a war between the two countries. We believe that these circumstances, too, point in the other direction.

B

Article IV guarantees the inheritance rights of Germans both with respect to real and personal property. The Article is a common one in the treaties of the United States and has frequently been before the courts. It is now well settled that the language of paragraph one of the Article, relating to real property, guarantees to the foreign heir the right to take real property, with no qualification other than that, where the state law forbids the ownership of real property by aliens, the heir must sell the property within the period specified. Language similar to that of paragraph two, with respect to personal property, has, however, been held by this Court to guarantee the right to inherit personal property only from estates of alien decedents. Assuming what the record does not show, that the decedent was an American citizen, it is submitted that paragraph two should not be limited to cases of alien decedents but should be construed, in this respect, as broadly as paragraph one. In deciding to the contrary, this Court did

not have before it the diplomatic materials, discussed in this brief, which demonstrate that the treaty provision was intended to guarantee rights to inherit both real and personal property, without regard to the citizenship of the decedent.

II

Apart from the effect of the treaty, the California statute is invalid as an invasion of the exclusively Federal field of control over our foreign relations. The exchange of inheritance rights of American citizens abroad for reciprocal rights of aliens in this country is a matter for international negotiation by the Federal Government, and numerous treaties providing for reciprocal inheritance rights have been concluded by the United States. By conditioning the rights of aliens on the existence of reciprocal rights in the country of the aliens' residence, the statute seeks to accomplish the same object as the treaties. A State may not directly legislate or negotiate for the grant by foreign countries of inheritance rights to American citizens and it may not indirectly accomplish that purpose by conditioning its legislation on such a grant.

III

If, despite the arguments summarized above, the California statute is held valid, it should be construed to impose upon the respondent heirs the burden of proof of the nonexistence of inherit-

ance rights of American citizens in Germany. As amended while appellate proceedings in this case were pending, the statute provides that the existence of such rights shall be presumed unless the contrary is shown by any person interested in the estate.

ARGUMENT

I

ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY IS CONTROLLING HERE AND SUSTAINS THE CUSTODIAN'S TITLE TO THE ESTATE INVOLVED

A. ARTICLE IV HAS CONTINUED IN FORCE DURING THE PRESENT WAR

Treaty provisions are no longer regarded as automatically abrogated by the outbreak of war between the signatory powers. In the absence of evidence of the intention of the parties, the test is the compatibility of the continued existence of the treaty clause with the state of hostilities. *Karnuth* v. *United States,* 279 U. S. 231; *Society for the Propagation of the Gospel* v. *New Haven,* 8 Wheat. 464, 494–495; *The Sophie Rickmers,* 45 F. 2d 413 (S. D. N. Y.). See Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946), 34 Geo. L. J. 129.[2]

[2] The reporter of the Harvard Law School Draft Convention on the Law of Treaties (1935) 29 Am. J. Int. L. Supp., Part III, pp. 1185–1186, has commented on the subject as follows:

"It has come more and more to be realized that there is no necessary incompatibility between the existence of a state of war between two or more states and the maintenance in force

The appellate courts to which this problem was presented following the First World War held that treaty provisions substantially indentical to Article IV survived the hostilities between the signatories. The subject is exhaustively dealt with in an opinion by Judge Cardozo for the New York Court of Appeals in *Techt* v. *Hughes,* 229 N. Y. 222, certiorari denied, 254 U. S. 643, with respect to the reciprocal inheritance clause of the Treaty of May 8, 1848, with Austria (Art. II, 9 Stat. 944, 945). And the Nebraska and Kansas courts have followed *Techt* v. *Hughes* in passing upon the continuing effectiveness of a corresponding provision of the Treaty of May 1, 1828, with Prussia (Art. XIV, 8 Stat. 378, 384). *Goos* v. *Brocks,* 117 Neb. 750; *State ex rel. Miner* v. *Reardon,* 120 Kan. 614.

Techt v. *Hughes* concerned the capacity of a resident alien enemy to inherit real property in New York. Under New York law an alien enemy had no such right and the question was, there-

---

of their treaties, even though it may be necessary to suspend their execution during the period of hostilities. There is no reason of public policy or national defense why any treaties should be regarded as *ipso facto* annulled or terminated by the outbreak of war between the parties. Likewise it is more and more realized that there may be treaties or particular stipulations of treaties of which no consideration of public policy or belligerent interest requires that they should even be suspended. In this class are such treaties as those which do not require for their execution direct relations between the enemy parties such as would be incompatible with the carrying on of hostilities."

fore, whether the right was granted by the reciprocal inheritance provision in the treaty with Austria.

Judge Cardozo analyzed fully the principles bearing on the abrogation of treaties by war. His conclusion was that "provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected" (229 N. Y., at 241). He went on to discuss what he believed to be the limited role of the courts in the application of this rule (*ibid.*, 242–243):

> The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance" (Jay, Ch. J., in *Jones* v. *Walker*, 2 Paine 688, 701. Cf. The Legal Nature of Treaties, vol. 10, American Journal of Int. Law [1916], pp. 721, 722). President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *U. S.*, 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either

> tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

Finding nothing incompatible with national policy in permitting a resident alien to have the rights of inheritance granted by the treaty there involved, Judge Cardozo went on to discuss the case of the nonresident enemy. That discussion is peculiarly applicable to the instant case since it was written in 1920 at a stage after the termination of hostilities in the last war approximately

equivalent to the present stage of development of enemy property legislation and the peace treaties (*ibid.*, 244–245):

> The plaintiff is a resident; but even if she were a non-resident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; *Brown* v. *U. S.*, 8 Cranch, 110). Since the argument of this appeal, Congress has already directed, in advance of any treaty of peace, that property in the hands of the custodian shall be returned in certain classes of cases to its owners, and in particular where the owner is a woman who at the time of her marriage was a native-born citizen of the United States and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary (Act of June 5, 1920, amending sec. 9 of the act of Oct. 6, 1917). It follows that even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there

> is conflict between the treaty and the statute (40 Stat. ch. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force. There is in truth no conflict here except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation.

This persuasive analysis of the question of survival of reciprocal inheritance treaty provisions in time of war should, we urge, be followed by this Court. The essential provision of Article IV of the Treaty of 1923 with Germany, that nationals of either country should have rights of inheritance in the other, could be given effect throughout this war in a manner, to use Judge Cardozo's phrase, entirely "compatible with a state of hostilities". The succession by a German to mere ownership of property in the United States could have offered no possibilities of impeding our military or economic mobilization. In view of other safeguards, a German's acquisition of title could not have resulted in his being able to use the property in any way prejudicial to our national interest. Such a possibility was averted by the existence of the power in the Custodian to regulate use of such property as the national interest may require, or, as has been done in this case, to vest the German's title. Sec. 2, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205; Sec.

5 (b), as amended, *infra*, p. 84. Concluding as we believe we must, that nothing in the prosecution of the war required an eradication *ab initio* of a German's right to succeed by inheritance, we need not consider whether other provisions of the treaty became ineffective because of incompatibility with a state of hostilities.

The court below did not differ with the authorities on the effect of war on treaties generally (R. 36). It held, however, (a) that Article IV became inoperative because its provisions are irreconcilable with the provisions of the Trading with the Enemy Act and the amendments to it enacted in 1941; and (b) that the circumstances existing at the time of the signing of the treaty show that it was intended to be abrogated by a war.

(1) *The Trading with the Enemy Act and the Treaty.*—The first ground indicated for the holding below is that the rights granted by Article IV are irreconcilable with those provisions of the Trading with the Enemy Act and the Executive Orders issued thereunder which have the effect of forbidding the entry into this country of nonresident enemy heirs, their communicating with persons in this country, and their withdrawal of the proceeds of the inheritance (R. 36–37); and with those provisions which authorize the vesting of alien property (R. 39).

None of these provisions is necessarily irreconcilable with the right to inherit granted by Article

IV. Neither entry into this country nor communication with persons in this country (Sections 2, 3, 40 Stat. 412, 50 U. S. C. App. 2, 3), nor withdrawal of the proceeds of an inheritance (Executive Order No. 8389, 5 F. R. 1400, as amended) is indispensable to an enemy heir's succession to ownership. And even if they were, it is provided that such acts and transactions may be licensed. Moreover, the Custodian is expressly empowered to represent such an heir in all legal proceedings incident to succession. Sec. 5, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205. See *Annual Report of the Office of Alien Property Custodian for the Fiscal Year Ending June 4, 1944,* pp. 12, 131–132.

Similarly, the authority to vest alien property (Section 5 (b), as amended by the First War Powers Act, p. 84, *infra*), is not irreconcilable with a German's right to inherit. In fact, it is only on the assumption that, in accordance with Article IV of the treaty, a German becomes the owner of property left to him by a decedent in the United States, that the vesting power could be brought to bear upon his inheritance. Furthermore, since the Custodian's authority to vest is discretionary and not mandatory, there is no inevitability that a German's inheritance will be vested. And where there is vesting by the Custodian, the point of time at which it must take place is further proof that the Act and the treaty are not irreconcilable. The treaty operates to

assure the German's succession to ownership at the time of the decedent's death (in this case, 1942). The vesting order addressed to such an inheritance must necessarily operate later (in this case, 1943), after the treaty has had its effect. Finally, even though vesting terminates all interest of the German in the vested property, it is by no means certain that he will be completely and permanently deprived of all benefits of his inheritance. If the German owes money to American creditors, the property will be applied to the payment of his debts. Section 34, added by Section 305, First War Powers Act, 1941, as amended by Public Law No. 671, 79th Cong., 2d Sess. And it is not impossible that by the peace treaty [3] or legislation [4] further provision of advantage to some classes of former owners of vested property will be made.

The court below nevertheless found in the vesting authority of Section 5 (b) as amended by

[3] In the treaties of peace with Italy and the satellite nations, signed February 10, 1947, each of the Allied and Associated Powers has undertaken to return the residue of the property within its territory and belonging to these ex-enemy nations and their nationals, after the satisfaction of war claims and debts. The ex-enemy nations have undertaken to compensate those of their nationals whose property is not returned. Art. 79, Treaty with Italy, p. 37; Art. 25, Treaty with Bulgaria, p. 12; Art. 29, Treaty with Hungary, p. 16; Art. 27, Treaty with Roumania, p. 13, *Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland*, State Dept. Pub. No. 2743.

[4] With respect to property vested during this war, Congress has recently granted authority which permits the return of

the First War Powers Act (p. 84, *infra*), special confirmation of its view that Article IV must be regarded as abrogated. In the enactment of the First War Powers Act, the court declared, "Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision" (R. 39). While it is correct to state that Congress took no notice of the reciprocal inheritance provision of the treaty in amending Section 5 (b),[5] the proper conclusion from such silence is rather

property formerly owned by classes of persons not deemed hostile to the United States, including enemy nationals who have been the victims of political, racial or religious discrimination by the enemy. Sec. 32 (a), added by Public Law No. 322, 79th Cong., 2d Sess. and as amended by Sec. 2, Public Law No. 671, 79th Cong., 2d Sess.

[5] We have found no reference to the question of treaty obligations in the legislative history of the First War Powers Act, 1941 (55 Stat. 839), which contains the amendment to Section 5 (b) under discussion.

The legislative history of the Trading with the Enemy Act and its earlier amendments gives no indication that Congress adverted to a possible relationship between the legislation and treaty provisions for reciprocal inheritance rights. In the course of the discussions in the Congress there were many references to Article XXIII of the Treaty of July 11, 1799, with Prussia, 8 Stat. 162, 174 (as revived by Article XII of the Treaty of May 1, 1828, 8 Stat. 378, 384), which provided that in time of war the contracting parties would permit the merchants of the other party to leave the country with their possessions. *E. g.*, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess., p. 33; 55 Cong. Rec. 4851, 65th Cong., 1st Sess.; 61 Cong. Rec. 2510, 3283, 3298, 67th Cong., 1st Sess.; Hearings before the House Committee on Inter-

that Congress has thereby *not* shown an intention to abrogate. *Cook* v. *United States*, 288 U. S. 102, [illegible] Section 5 (b) authorizes the vesting of property of "any foreign country or national thereof," not merely of enemies. If this wide grant of authority be held to constitute abrogation of Article IV of the treaty with Germany, the abrogation would logically extend to the comparable clauses in our existing treaties with such friendly countries as Great Britain (Art. I, II, March 2, 1899, 31 Stat. 1939), Norway (Art. IV, June 5, 1928, 47 Stat. 2135, 2138), Brazil (Art. XI, Dec. 12, 1828, 8 Stat. 390, 392), and Spain (Art. III, July 3, 1902, 33 Stat. 2105, 2107). See Appendix C, pp. 93–94, 94 n. 1. An intention to abrogate all these treaty clauses cannot be attributed to Congress merely because of the failure of Congress to consider the instant treaty at the time of the amendment of Section 5 (b). To the contrary, it is established that a treaty will not be deemed to have been abrogated by a later statute unless an intention to abrogate has been clearly

---

state and Foreign Commerce on H. R. 13496, 67th Cong., 4th Sess., pp. 40, 155, 181, 227; 69 Cong. Rec. 882, 70th Cong., 1st Sess.; Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154. We have found no mention, however, of the possible effect of the Act on Article XIV of the treaty of 1828, the clause which provides for reciprocal inheritance rights (8 Stat. 378, 384).

manifested. *Cook* v. *United States,* 288 U. S. 102, 120; *Chew Heong* v. *United States,* 112 U. S. 536.

We believe that neither the general prohibition in the Trading with the Enemy Act against transactions by and with enemies nor the broad authority to vest any property of a "foreign country or national thereof" can properly be regarded as irreconcilable with the continuing validity of Article IV of the treaty with Germany. But even if clear conflict with the Germans' right to inherit resulted from the administration of the Act, we suggest that abrogation of the treaty would not be the result. The Act was not addressed specifically to the problem of inheritance by enemies. If that problem is affected, it is only because of the comprehensiveness of provisions addressed generally to trading with the enemy and vesting of alien property. The impact of the Trading with the Enemy Act upon the reciprocal inheritance provisions of Article IV is incidental, subsidiary, and fortuitous.

Abrogation of a treaty is hardly a matter to be concluded as an unintended consequence of a general legislative program. At most, the claimed inconsistency between the Act and the treaty would ordinarily give rise to a diplomatic complaint that the executive branch of the Government, under broad authority conferred by the legislative branch, has acted in violation of the

treaty. If such an unintended breach of the treaty obligation has been committed, the consequences are political questions which only the executive and legislative branches can resolve[6] (*Head Money Cases,* 112 U. S. 580, 599; see also *George E. Warren Corp.* v. *United States,* 94 F. 2d 597 (C. C. A. 2)), but there has not been the equivalent of abrogation (*cf. Charlton* v. *Kelly,* 229 U. S. 447). Until the will of the political departments of the Government is unambiguously expressed to the contrary, the treaty remains, as the Constitution requires, the supreme law of the land.

---

[6] Respondents' brief in opposition to certiorari (p. 8) apparently suggests that on the collapse of the German Government in 1945, the German state became incapable of performing its treaty obligations. The existence of Allied control in Germany, however, insures that Germany can comply with the obligations of the treaty. The Allied Control Council has assumed the control of Germany's foreign affairs and treaty obligations, and has directed that property in Germany belonging to nationals of the United Nations be reported and safeguarded until, on the direction of the Council, it is handed over. Agreement between Governments of the United Kingdom, the United States of America, the U. S. S. R., and the Provisional Government of the French Republic, Berlin, September 20, 1945, Sec. III, paragraphs 5, 6; Sec. VI, paragraphs 19 (b), 19 (c), *The Axis in Defeat,* State Dept. Pub. No. 2423, pp. 71, 72, 77. In any event, since the power of a state to perform its treaty obligations is a political question (*Terlinden* v. *Ames,* 184 U. S. 270, 288), the incapacity of Germany to perform the treaty obligations cannot affect the continued validity of the treaty as the law of the land, in the absence of abrogation by the political departments of this Government.

In confirmation of this conclusion, it may be noted that the State Department has expressed the opinion that Article IV has continued to be in effect, an opinion entitled to great weight. *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Charlton* v. *Kelly*, *supra*. The Department has concluded that "there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war." (Letter from Acting Secretary of State Grew to Attorney General Biddle, May 21, 1945, Appendix B, pp. 85, 89.)

(2) *The Treaty of Berlin.* The court below also found an intention that the treaty be abrogated or suspended in time of war in the Treaty of Berlin of 1921, restoring friendly relations with Germany (42 Stat. 1939) (R. 38).[7] The Treaty of Berlin ratified the right of the United States, reserved by the Joint Resolution of July

[7] The court suggested that further evidence of such an intention lies in the recognition by the parties that the reciprocal inheritance provision of the treaty of 1828 with Prussia (Art. XIV, 8 Stat. 378, 384), in force at the beginning of the First World War, was abrogated by that war and the Trading with the Enemy Act. This recognition, the court states, is shown by the inclusion of Article XIV in the new treaty of 1923, a "provision which would have been unnecessary if such provisions were still in effect under the older treaty" (R. 38). The court is in error in assuming that the ineffectiveness, in 1923, of the treaty of 1828 can be attributed only to its abrogation by the war. The treaty of 1828 was terminated in 1922 through the failure of the United States to give the notice required by the Treaty of Berlin for its revival. *The Sophie Rickmers*, 45 F. 2d 413 (S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States*, 59 F. 2d

2, 1921 (42 Stat. 105, 106), to retain seized German property until "suitable provision for the satisfaction" of war claims against the German Government should be made. The court cited this provision, and the decision of this Court, in 1936, that the Joint Resolution vested absolute title to the property affected in the United States (*Cummings* v. *Deutsche Bank*, 300 U. S. 115), to show an understanding, in 1923,

464, 470–471 (Ct. Cl.), certiorari denied, 286 U. S. 564; letter, Secretary of State Kellogg to Congressman Rainey, October 23, 1926, set out in *Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property*, 69th Cong., 1st Sess., p. 623; letter from the Department of State, dated March 21, 1923, set out in *Goos* v. *Brocks*, 117 Neb. 750, 755–56. Such terminations by a failure to revive under treaties of peace are, however, inconclusive as to the effectiveness of the treaty during the war. *The Sophie Rickmers*, *supra*, at p. 418.

For a discussion of the clauses, customarily found in treaties of peace, abrogating prior treaties which are not specifically revived by the parties, see Lenoir, *supra*, p. 12, at pp. 146–150. The treaties recently concluded with Italy and the satellite nations are consistent with the principle that the war did not abrogate the preexisting treaties between the parties. Article 44 of the treaty with Italy, typical of the four treaties, provides (State Dept. Pub. No. 2743):

> 1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive.
>
> * * * * * *
>
> 3. All such treaties not so notified shall be regarded as abrogated.

that enemy property would be confiscated in time of war and that a reciprocal inheritance treaty provision would not survive the outbreak of another war between the parties. It is most unlikely, however, that the parties to the treaty believed that enemy property was to be confiscated in time of war. In March, 1923, only a few months before the treaty was signed, Congress had given indication of favoring the contrary view by passing the Winslow Act, which authorized the return to former German owners of seized property not exceeding $10,000 in value (42 Stat. 1511, 1512, amending Section 9 (b), subdivisions 9, 10, 50 U. S. C. App. 9 (b)). And subsequent legislation providing for further returns of seized property confirms the conclusions that such retention as there was of seized property resulted from the failure of the German Government to make the "suitable provision" for the satisfaction of war claims required by the Joint Resolution of 1921 and the Treaty of Berlin, rather than from our adherence to a principle of "confiscation." Settlement of War Claims Act of 1928, 45 Stat. 254, 270; Joint Resolution No. 53, 48 Stat. 1267. See *Cummings* v. *Deutsche Bank, supra,* at 119.

In any event, the connection between the Joint Resolution and the Treaty of Berlin, on the one hand, and the subject of reciprocal inheritance rights during wartime, on the other, is too remote to warrant the conclusion that the Resolution and the Treaty are evidence of an intention that Article

IV of the 1923 Treaty should not survive a war. The Department of State has advised that, although there does not appear to be any evidence of the actual intention of the parties to the 1923 treaty with respect to the present question, "in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war." (Letter from Acting Secretary of State Grew to Attorney General Biddle, May 21, 1945, Appendix B, pp. 85, 92.)

B. UNDER ARTICLE IV, THE GERMAN NATIONALS SUCCEEDED TO THEIR INHERITANCE OF PERSONAL AS WELL AS REAL PROPERTY

Article IV of the treaty not having been abrogated, it supersedes contrary state law (*Ware* v. *Hylton,* 3 Dall. 199, 236–237, 242–243; *Hauenstein* v. *Lynham,* 100 U. S. 483, 488–490).[8] By its terms, Article IV protects rights to inherit personalty as well as realty, and we therefore contend that it assures that the estate of Alvina Wagner, which

[8] The opinion of the court below reflects an understanding that Article IV was offered to satisfy the requirement of proof under the California statute, that reciprocal inheritance rights exist in Germany (R. 34, 35–36, 40). The Custodian does not rely upon Article IV for such a purpose. To the contrary, we take the position that Article IV establishes the invalidity of the California statute, a position which renders questions of proof under the statute irrelevant.

includes both types of property, devolved upon her German beneficiaries. Realty and personalty are treated in separate paragraphs of Article IV, however, and in different language. Certain decisions of this Court, which we shall discuss later, may be cited to support an argument that the paragraph dealing with personalty is subject to a limitation, indisputably absent from the paragraph on realty, which makes it applicable only if the decedent was a citizen of the signatory country other than that in which the property is located. The record does not show Alvina Wagner's citizenship, and since this case arises on the Government's motion for judgment on the pleadings, we shall for purposes of argument proceed on the less favorable assumption, *i. e.*, that she was an American citizen. In our view, this assumption should not lead to the anomalous conclusion that under the treaty the German heirs' succession is assured with respect to one part of the estate and is left unaffected with respect to the other. The analysis which follows demonstrates, we submit, that such a conclusion is at odds with the history and functions of Article IV.

1. *Realty*

The first paragraph of Article IV governs the succession to realty. It provides (44 Stat. 2132, 2135):

> Where, on the death of any person holding real or other immovable property or inter-

> ests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

There can no longer be any doubt that under this paragraph the German heir of "any person" holding real property in the United States may succeed to such real property, although he is required to sell the property within the specified period. The language of what is now paragraph one first appeared in the Treaty of September 10, 1785, of Amity and Commerce with Prussia (8 Stat. 84, 88), and is found in a large number of treaties thereafter concluded by the United States. See Appendix C, p. 93. Many of these treaties have been applied in the settlement of decedents' estates, and the all but uniform conclusion

of the courts [9] has been that this provision permits alien heirs to take the proceeds of an inheritance of real property despite state law purporting either to limit an alien's right to inherit or to impose discriminatory succession taxes on alien heirs. *Hauenstein* v. *Lynham*, 100 U. S. 483 (Art. V, Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590) [10]; *Colson* v. *Carlson*, 116 Kan. 593 (Art. I, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939) [11]; *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643 (Art. II, Treaty of May 8, 1848, with Austria, 9 Stat. 944, 945) [12]; *People* v. *Gerke and Clark*, 5 Cal. 381 (Art. XIV, Treaty of May 1, 1828, with Prussia, 8 Stat. 378, 384) [13]; *Goos* v. *Brocks*, 117 Neb. 750 (Art. VII, Treaty of December 20, 1827, with the Hanseatic Republics, 8 Stat. 366, 370) [14]; *Scharpf* v. *Schmidt*, 172 Ill. 225 (Art. II, Treaty

[9] The only decision to the contrary is one by the California District Court of Appeal, now pending in the Supreme Court of California after argument. *Estate of Knutzen*, 70 A. C. A. 856, 161 P. 2d 598. That case, involving Article IV of the treaty of 1923, is substantially identical with the instant one.

[10] *Accord: Lehman* v. *State*, 45 Ind. App. 330.

[11] *Accord: Sullivan* v. *Kidd*, 254 U. S. 433, *passim*; *Bamforth* v. *Ihmsen, Admr.*, 28 Wyo. 282, 307–312; *Dockstader* v. *Kershaw*, 4 Pennewill (Del.) 398; *McKeown* v. *Brown*, 167 Ia. 489; *Pierson* v. *Lawler*, 100 Neb. 783.

[12] *Accord: Fischer* v. *Sklenar*, 101 Neb. 553.

[13] *Accord: State ex rel. Miner* v. *Reardon*, 120 Kan. 614; *Miller* v. *Clausen*, 299 Fed. 723 (C. C. A. 8), appeal dismissed by consent, 269 U. S. 595; *Ripley* v. *Sutherland*, 40 F. 2d 785 (App. D. C.), certiorari denied, 282 U. S. 865; *Doehrel* v. *Hillmer*, 102 Ia. 169; *Wilcke* v. *Wilcke*, 102 Ia. 173; *Goos* v. *Brocks*, 117 Neb. 750.

[14] *Accord: Schultze* v. *Schultze*, 144 Ill. 290.

of April 10, 1844, with Wurttemberg, 8 Stat. 588) [15]; *Ahrens* v. *Ahrens,* 144 Iowa 486 (Art. X, para. 9, Treaty of June 10, 1846, with Hanover, 9 Stat. 857, 865); *Bollermann* v. *Blake,* 24 Hun. 187, affirmed, 94 N. Y. 624 (Art. II, Treaty of March 26, 1844, with Hesse, 9 Stat. 818).[16] "The treaties have always been for the purpose of enabling an alien to take even though the particular State may not have expressly permitted it." *Blythe* v. *Hinckley,* 180 U. S. 333, 341.

2. *Personalty*

The second paragraph of Article IV provides (44 Stat. 2132, 2135):

> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their

[15] *Accord: Kull* v. *Kull,* 37 Hun 476 (N. Y.); *Wieland* v. *Renner,* 65 How. Pr. 245 (N. Y.).

[16] The nature of the title acquired by the alien heir has been variously described as a fee (*Kull* v. *Kull,* 37 Hun (N. Y.) 476, 478–479), a "base or qualified or a terminable fee" (*Miller* v. *Clausen,* 299 Fed. 723, 727 (C. C. A. 8), appeal dismissed, 269 U. S. 595), and a determinable fee (*Schultze* v. *Schultze,* 144 Ill. 290, 297). The terminology has been recognized to be unimportant. "That the right to sell carried with it the ownership as a necessary incident to the power of sale is held by all the authorities." *Ahrens* v. *Ahrens,* 144 Iowa 486, 489. See *Techt* v. *Hughes,* 229 N. Y. 222, 240, certiorari denied, 254 U. S. 643.

> heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

The first sentence of this paragraph couples two clauses, each of which was intended to fulfill a separate purpose. The first provides for the freedom of disposition of personal property and the second for freedom of receipt of such property by donees and heirs. Although the sentence has appeared in some fifty treaties concluded by the United States (Appendix C, p. 93), it was first written in 1785 [17] with the civil, and not the

[17] Article IV of the instant treaty is based on Article X of the treaty of 1785 with Prussia (8 Stat. 84, 88). Article X appears as Article X of the renewal Treaty of July 11, 1799 (8 Stat. 162, 166) and was again copied as Article XIV of the treaty of May 1, 1828 (8 Stat. 378, 384; see 2 Drafts of Treaties (Germany–1828) 233, MSS., Nat. Archives). At the time of the ratification of the 1923 treaty, Secretary of State Hughes wrote to Senator Lodge, Chairman of the Senate Committee on Foreign Relations, that "Comment regarding Article IV of the new draft is believed to be unnecessary except to call attention to the similarity of this Article to Article XIV of the Treaty with Prussia [of May 1, 1828]".

common law,[18] in mind. The necessity for separate statement of the two clauses lay in the fact that by the *droit d'aubaine* and the *droit de detraction*, the civil law imposed restrictions upon both the alien's right to dispose of his property and his right to inherit property.[19]

Letter dated January 17, 1924, Dept. State File 711.622/36, MSS., Nat Archives.

The citations to fifty-two treaties modeled on the treaty of 1785 with Prussia are collected in Appendix C, p. 93; see also Gibson, *Aliens and the Law*, (1940) App. B, Table 8, pp. 182–183.

[18] The United States gave little in return for the privileges granted to American citizens by the reciprocal inheritance clauses with respect to personalty in our early commercial treaties, since the common law imposed no restrictions on the right of an alien to inherit personal property. 2 *Kent's Commentaries*, Sec. 62; Devlin, *Treaty Power* (1908), Sec. 229. One author has commented that the valuable exemptions in the treaty of 1783 with France from the continental restrictions was obtained by "simply giving a corresponding concession in return therefor, and exempting citizens of France from similar burdens, if any existed, in this country." 1 Butler, *Treaty Making Power in the United States* (1902), Sec. 153.

[19] The *droit d'aubaine* was the right of the sovereign to the property of an alien dying in the realm and the *droit de detraction* was the tax imposed on the right of an alien to inherit the property of a deceased person. *Nielsen* v. *Johnson*, 279 U. S. 47, 55, n. 2, 55–56. See also 4 Miller, *Treaties and Other International Acts of the United States* (1934) 546; Wheaton, *International Law* (8th ed.), Sec. 82; 2 Calvo, *Le Droit International* (5th ed. 1896), Sec. 526; 5 Guyot, *Répertoire de Jurisprudence* (1784) Detraction 567.

The droit d'aubaine included the complementary incapacity of an alien to inherit even from a citizen. *Nielsen* v. *Johnson*, *supra*; 2 Vattel, *Le Droit des Gens*, sec. 112, Classics of International Law, Fenwick trans., p. 147; Demangeat,

With respect to the first clause, dealing with rights of disposition, it is quite clear that the only property comprehended is property belonging to a national of one of the High Contracting Parties located "within the territories of the other." Since nationals have always had the right to dispose of property in their own country, it was only property "within the territories of the other" country which afforded a subject for treatment by international agreement. The purely domestic nature of a national's rights to dispose of property in his own country made it superfluous to treat such property in this clause. The second clause, however, is a different matter. It is addressed to the right of nationals of one country to *succeed* to property located in the other. The *droit de detraction* applied to all such property whether the decedent was a national or an alien. See n. 19, *supra*. Hence, there was no reason to limit the privilege of succession to the property of nationals only. We submit, therefore, that the difference in the functions of the two clauses argues against reading the second clause as limited to the cases encompassed by the first. The second clause can be so limited only by making the word "such," which precedes "personal property" in the second clause, carry an extremely heavy freight of meaning. "Such" must be accepted not merely as importing from the

---

Histoire de la Condition Civile des Étrangers en France (1844), p. 107; 6 Fuzier-Herman, *Répertoire Générale Alphabétique du Droit Francaise* (1890) 358, Aubain 6.

first clause the direct reference to "personal property of every kind within the territories of the other"; it must also be accepted as transmitting to the second clause the limitation relevant only to the first, that the property in question be owned by a national of the country other than the one in whose territories the property is located.

In our view it is much more natural as a matter of grammar to read the second clause as a grant of rights of succession independent of the limitation germane to the first. When the references from the first clause are incorporated it becomes clear that the second clause grants inheritance rights without regard to the citizenship of the decedent:

> and the heirs, legatees and donees [of nationals of either High Contracting Party], of whatsoever nationality, whether resident or nonresident, shall succeed to personal property [of every kind within the territories of the other].

Under the clause thus construed, an heir of German nationality may succeed to personal property in the United States, and an heir of American nationality may similarly succeed to such property in Germany, regardless of the citizenship of the decedent.

While there is little evidence of the interpretation placed on this language by the parties in 1923, at the time of the conclusion of the instant

treaty,[20] this reading accords with the mutual interest of the two Governments at that time. From the point of view of the German Government, it was as important to secure the right of their nationals to inherit property in this country from American citizens as it was to secure the right of such nationals, concededly granted by the paragraph, to inherit such property from German citizens. Indeed, in view of the high rate of naturalization of immigrants of German origin,[21] the right of Germans to inherit property in this country from American citizens was by far the more valuable right to the German Government. And the reciprocal right, the right of American

[20] The interpretation advanced in this brief finds support in the translation of the two clauses into German. In the German text, the first and second clauses are separate sentences, the conjunctive "and" being omitted (44 Stat. 2132, 2135). There is, however, no extrinsic evidence relevant to this question. The memorandum of explanation agreed upon by the negotiators prior to the signature of the treaty discusses only the first paragraph of Article IV, which deals with real property and, moreover, states that the memorandum is not to be taken as an interpretation of the treaty. See 2 *Foreign Relations of the United States*, 1923, pp. 24, 25, 28. The first draft of the treaty was prepared by this government and contained Article IV in its final form. Letter, Secretary of State Hughes to the German Ambassador, Dr. Otto Wiedfelt, July 25, 1923, Dept. State File 711.622/21a, MSS., Nat. Archives. Secretary Hughes commented on the second paragraph that it was "self-explanatory." Letter, Secretary Hughes to the American Minister at Berlin, Alanson B. Houghton, August 3, 1923, *ibid.* /22a.

[21] The rate in 1930 was approximately 70%, as compared with approximately 58% for the entire foreign-born white population. See *Fifteenth Census of the United States (1930)*, *Population*, Vol. II, pp. 401–406.

citizens to inherit estates in Germany from German citizens, was also of considerable importance to the United States. The flow of immigration has consistently been into the United States, and, therefore, it has aways been more likely than not that the decedent in an estate in Germany falling to American citizen heirs would be a German citizen. The United States was, therefore, at least equally interested in securing the right of our citizens to inherit estates in Germany from German citizens as it was in their right to inherit such estates from American citizens.

In 1860, this Court, in interpreting the similar Treaty of 1844 with Wurttemberg, adopted a construction contrary to the one we advance here. *Frederickson* v. *Louisiana*, 23 How. 445. Three subsequent decisions of this Court have followed *Frederickson* v. *Louisiana* (*Petersen* v. *Iowa*, 245 U. S. 170; *Skarderud* v. *Tax Commission*, 245 U. S. 633; *Duus* v. *Brown*, 245 U. S. 176[22]), al-

[22] In *Petersen* v. *Iowa*, it was held that Article VII of the Treaty of April 26, 1826, with Denmark (8 Stat. 340, 342) as renewed in 1857 (Art. V, 11 Stat. 719, 720) applied only where the decedent was an alien. That treaty was written in terms of equality of taxation, and the *Petersen* case is of little relevance here. In *Duus* v. *Brown* and *Skarderud* v. *Tax Commission*, companion cases to *Petersen*, a similar decision was made with respect to Art. VI of the Treaty of April 3, 1783, with Sweden (set out *infra*, p. 42, n. 28), as revived in 1816 (Art. XII, 8 Stat. 232, 240) and in 1827 (Art. XVII, 8 Stat. 346, 354). This treaty provision is comparable to the instant treaty. The *Duus* case, however, merely affirmed the decision below on the authority of *Petersen* v. *Iowa*. And *Skarderud* was an affirmance *per curiam* on the authority of *Duus*.

though the decisions of state courts have not.[23]

Since the four cases in this Court involved the validity of discriminatory inheritance taxes on personalty inherited by nonresident aliens, the Court was not directly confronted with the question now raised—whether the realty and personalty provisions of the treaty involved should be similarly construed, without regard to the citizenship of the decedent.[24] In none of these cases, moreover, did the Court have before it the historical material on the treaty clause involved, to which we now turn.

1. *History of the treaty clause prior to Frederickson* v. *Louisiana.*—Together with a large

[23] *Trott* v. *State*, 41 N. D. 614 (Art. II, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939); *In re Moynihan*, 172 Ia. 571 (Art. II, Treaty of 1899 with Great Britain, *supra*); *Brown* v. *Peterson*, 185 Ia. 314 (Art. XIV, Treaty of June 1, 1910, with Sweden, 37 Stat. 1479, 1488); *Olsson* v. *Savage*, 119 Kan. 603 (Art. XIV, Treaty of June 1, 1910, with Sweden, *supra*); *Schultze* v. *Schultze*, 144 Ill. 290 (Art. VII, Treaty of Dec. 20, 1827, with the Hanseatic Republics, 8 Stat. 366, 370); *Jost* v. *Jost*, 1 *Mackey* (12 D. C.) 487 (Art. V, Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590). See also *Re Stixrud*, 58 Wash. 339 (Art. VI, Treaty of April 3, 1783, with Sweden (set out *infra*, p. 42, n. 28).

[24] It is noteworthy that the courts of Iowa and North Dakota, whose judgments were affirmed by this Court in the *Petersen*, *Duus* and *Skarderud* cases, *supra*, later held, when they were presented with modern treaties similar to Article IV of the 1923 treaty, that the language with respect to personalty clause has the same effect as the realty clause. *Trott* v. *State*, *supra*, n. 23; *Brown* v. *Peterson*, *ibid.*; *In re Moynihan*, *ibid.*

number of other treaties, the instant treaty is based on Article X of the treaty of 1785 with Prussia. See n. 17, *supra*. The Prussian treaty, in turn, evolved from the earlier treaties of amity and commerce with France, The Netherlands and Sweden. The diplomatic correspondence for all of these treaties shows that the reciprocal inheritance clause now before the Court has always been understood as providing for inheritance rights without regard to the citizenship of the decedent. In view of the relationship of the instant treaty to these earlier treaties, this evidence may be relied upon here. *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–95 *In re Ross*, 140 U. S. 453, 467; *Perkins* v. *Elg*, 307 U. S. 325, 335; *Wildenhus's Case*, 120 U. S. 1.

a. *The treaties with France, The Netherlands and Sweden.* Our first treaty of amity and commerce, that of February 6, 1778, with France, contained a clause directed specifically at the *droit d'aubaine* and the *droit de detraction*. Art. XI, 8 Stat. 12, 18.[25] In our second and third

[25] "The subjects and inhabitants of the said United States, or any one of them, shall not be reputed aubains in France, and consequently shall be exempted from the *droit d'aubaine* or other similar duty under what name soever. They may by testament, donation, or otherwise, dispose of their goods moveable and immoveable in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of natu-

treaties of amity and commerce, with The Netherlands and Sweden, a more general clause, closer in phraseology to the personalty clause of the later treaty with Prussia, provided for the inheritance of both real[26] and personal property, without qualification. Art. VI, Treaty of October

---

ralization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called droit de detraction or other duty of the same kind, * * * The subjects of the most Christian King shall enjoy on their part in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article."

[26] These treaties used the words "effects" and "goods," which have been held to include realty. *Todok* v. *Union State Bank*, 281 U. S. 449; *University* v. *Miller*, 14 N. C. 188; *Adams* v. *Akerlund*, 168 Ill. 632; *Contra: Johnson* v. *Olson*, 92 Kan. 819; *Succession of Sala*, 50 La. Ann. 1009. See 2 Miller, *Treaties, etc.* 150.

On the ground, *inter alia*, that the inclusion of real property would encroach on the powers of the States, it was proposed in the Congress to limit the treaty with The Netherlands to personalty. XXII Journals of the Continental Congress (1914) 374, 375–376, 393–396. While the proposal was voted down, the committee of the Congress which recommended ratification of the treaty was pleased that the final form of the treaty used the term "effects" rather than the explicit language "goods, moveable or immoveable". The committee apparently hoped that "effects" would not be taken to include realty. XXIV *ibid.* (1922) 64, 65. See 1 Curtis, *Constitutional History of the United States* (1889) 188–190. A proposal to limit the treaty with Sweden to personalty was also made. The grounds do not appear and the proposal was either voted down or otherwise abandoned. XXIII Journals of the Continental Congress (1914) 622, 623.

8, 1782, with The Netherlands (8 Stat. 32, 36);[27] Art. VI, Treaty of April 3, 1783, with Sweden (8 Stat. 60, 64).[28] The instructions of the Continental Congress to John Adams, appointed to negotiate the treaty with The Netherlands, show that the Congress did not intend that the rights of heirs should be conditioned on the citizenship of their ancestors. The Congress recommended the inclusion of the following Article (XVIII Journals of the Continental Congress (1910) 1205, 1209):

> It shall be lawful and free for merchants and others being subjects either of the said seven United Provinces of the low countries, or any of the said United States of Amer-

[27] "The subjects of the contracting parties may, on one side and on the other, in the respective countries and states dispose of their effects, by testament, donation, or otherwise; and their heirs, subjects of one of the parties, and residing in the country of the other, or elsewhere, shall receive such successions, even ab intestato, whether in person or by their attorney or substitute, even although they shall not have obtained Letters of Naturalization * * *"

[28] "The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *droit de detraction* on the part of the government of the two states respectively * * *."

ica, by will, or any other disposition, made either during the time of sickness or at any other time before, or at the point of death, to devise or give away to such person or persons as to them shall seem good, their effects, merchandise, money, debts, or goods, moveable or immoveable, which they have or ought to have at the time of their death, or at any time before, within the countries, islands, cities, towns or dominions belonging to either of the said contracting parties. Moreover, whether they die having made their wills, or intestate, their lawful heirs, executors or administrators residing in the dominions of either of the contracting parties, or coming from any other part, although they be not naturalized, and without having their right contested or impeded under pretext of any rights or prerogatives of provinces, cities or private persons, shall freely and quietly receive and take possession of all the said goods and effects whatsoever, according to the laws of each country respectively * * *

This draft, it is believed, shows an intention to provide both for a right of disposition of property by ancestors and for a right of receipt of inheritances by heirs. There is no suggestion that the latter right is merely incidental to the former or that it is to be dependent on the citizenship of the decedent. While the draft was greatly condensed in the treaty as concluded (n. 27, *supra*), there is no indication of an intention to change its substance.

b. *The Treaty of 1785 with Prussia.*—The distinction between the realty and personalty clauses was first made in the Treaty of September 10, 1785, with Prussia. The first draft of the treaty, proposed by Prussia after some preliminary negotiations between the Prussian representative and John Adams, contained a clause substantially similar to the corresponding clause of the earlier Dutch and Swedish treaties. 2 *Diplomatic Correspondence of the United States, 1783–1789* (1833) 111, 116–117.

Apparently out of lingering doubts as to the scope of the treaty-making power of the Confederation[29] the Continental Congress, however, instructed its Commissioners, Franklin, Jefferson and Adams (XXVI Journals of the Continental Congress (1928), 357, 360–361):

> That no rights be stipulated for aliens to hold real property within these States, this being utterly inadmissible by their several laws and policy; but where on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by their laws descend on a Subject or Citizen of the other were he not disqualified by alienage, there he shall be allowed a reasonable time to dispose of the same, and withdraw the proceeds without molestation.[30]

---

[29] See n. 26, *supra*.

[30] When this instruction was presented to the Prussians, they expressed a preference for their original proposal, on the ground, *inter alia*, that the original had reciprocally ex-

Article X of the Treaty, as drafted by the Commissioners (Letter Book of the Commissioners, 116 Papers of the Continental Congress, pp. 66, 74, MSS., Library of Congress), reproduced the instruction from the Continental Congress as an exception to the clause providing for reciprocal inheritance of "personal goods," which thenceforth was limited to personalty. Article X provided, in substantially the same language as Article IV of the instant treaty of 1923, as follows (8 Stat. 84, 88):

> The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods; whether

---

empted the nationals of the two countries from the *droit de detraction*, presumably without qualification. Letterbook of the Commissioners, 116 Papers of the Continental Congress, p. 166, MSS., Library of Congress.

The American Commissioners explained that the revision was attributable to the policy of the common law (8 *Diplomatic Correspondence of the United States*, 1783–1789 (1833) 269, 274):

"By the laws of the United States, copied in this instance from those of England, aliens are incapable of holding real estate. When an estate of that nature descends to an alien, it passes on by escheat to the State; the policy of the United States does not permit the giving to the subjects of any other power a capacity to hold land within their limits, which was proposed by the project formerly delivered to Mr. Adams. But they are perfectly willing to relieve such persons from all loss on this account, by permitting them to sell the inheritance and withdraw the proceeds without any detraction."

> by testament or *ab intestato,* and may take possession thereof either by themselves or by others acting for them; and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the government of the respective states.

It will be noted that the first sentence of this Article, which contains the clauses governing the disposal and inheritance of "personal goods", is based on the corresponding language of the earlier Dutch and Swedish treaties (p. 42, notes 27, 28, *supra*) with the addition, in the clause governing disposal, of the phrase "within the jurisdiction of the other". This phrase appears here for the first time and nothing bearing on its intended significance has been found. Its function seems to have been to define more precisely than did the Dutch and Swedish treaties the case in which *disposition* of property required protection from the *droit d'aubaine, i. e.,* the case of disposition of property located in a

country other than that of the citizenship of the owner. The phrase was unrelated to the problem of the extent to which rights of succession were to be granted, free from the *droit de detraction,* and cannot be said to have restricted such rights. Indeed, the terms of the real property clause, also newly-introduced, affirmatively suggest that the personal goods clause was intended to grant the right to inherit personal property from both alien and citizen decedents.

In the absence of the new clause explicitly dealing with real property, the reference to "personal goods" would have included both real and personal property. See p. 41, n. 26, *supra.* The real property clause was, therefore, a deliberate limitation on the scope of the rights to real property granted in the earlier treaties—a substitution of a right to proceeds for the right to take and hold title to real property. The substituted right clearly applied, however, to inheritance from both citizen and alien. The language explicitly comprehended inheritance from "any person holding real estate." It has never been suggested that this language does not guarantee the right to inherit from citizens [31] and such a suggestion would have been startling to the

[31] The question has never been raised in the many cases construing the realty clause (see pp. 30–32, *supra*) and the opinions frequently do not mention the citizenship of the decedent. In several cases, however, it appears that the decedent was an American citizen. *Colson* v. *Carlson*, 116 Kan. 593; *Goos* v. *Brocks*, 117 Neb. 750; *Opel* v. *Shoup*, 100 Ia. 407; *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643; *Dockstader* v. *Kershaw*, 4 Pennewill (Del.) 398.

members of the Congress who, being familiar with the common law incapacity of the alien to own real property, no doubt had in mind only the cases of inheritance from citizen owners. See n. 30, *supra*.[32] The real property clause was, then, a limitation on what would otherwise have been the effect of the "personal goods" clause, a limitation, however, which broadly included both the cases of citizen and alien decedents. The Congress which drafted this limitation must, therefore, have believed that the clause for the inheritance of personal goods had the same effect and applied equally to inheritance from citizen and alien.

c. *The Treaties with the German States, 1840-1850.*—This understanding—that the personalty clause applied to all heirs, whether of citizen or alien decedents—was repeatedly expressed during the period in the nineteenth century in which treaties incorporating Article X were being actively negotiated with a large number of countries. In the eighteen forties, similar treaties were negotiated by Henry Wheaton, then Minister to Prussia, with the German states of Bavaria, Hesse, Wurttemberg, Nassau and Saxony. See 4 Miller, *Treaties and Other International Acts of the United States of America* (1934) 546; Appendix C, p. 93. In these treaties the clauses relating

[32] This incapacity had at that time been modified only by the treaties with France, The Netherlands and Sweden, under which aliens might have become the owners of real property by virtue of inheritance.

to realty and personalty were for the first time set out in separate paragraphs.

In requesting authority to conclude these treaties, Mr. Wheaton described the purpose and desirability of reciprocal inheritance treaties as follows (Despatch, Wheaton to Legaré, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, *Treaties, etc., supra,* at 547–548):

> These odious prohibitions & taxes on the acquisition & transfer, by the citizens & subjects of one country of property situated in another, or on the sale of their property by the citizens & subjects of one country emigrating to another, which originated in the barbarous ages of the feudal system, when man was chained to the soil on which he grew, have been almost universally abolished by compact, & the common consent of most civilized nations. Almost every commercial Treaty, concluded by the United States with foreign Powers, contains a stipulation for that purpose. It is a matter of very considerable importance with respect to our intercourse with Germany, & the vast emigration constantly going on from this country to the U. States. In all the German States, where it is not otherwise provided by Treaty, a tax is levied on all property sold, & the proceeds of which are carried out of the country by Emigrants, which amounts, in most instances, to ten *per centum* on the capital thus transferred. That amount would con-

sequently be gained to the U. States by the proposed stipulations; & I cannot perceive that we should lose more than we should gain by the free disposition of property by testament or inheritance, on both sides; as, if there be many cases accruing of persons dying in the U. States, & leaving heirs in Germany, there are also probably as many cases of naturalized Germans, resident in the U. States, who are entitled to inherit the property of their relations deceased in Germany.

Mr. Wheaton speaks of the "odious prohibitions on the *acquisition* & transfer" by citizens of one country of property situated in another and states that almost every commercial treaty concluded by the United States contains a stipulation for abolishing these prohibitions and taxes. This statement, taken with his explanation of what we stood to lose or gain by such treaties, shows that he neither understood the existing treaties to limit the inheritance of personalty nor did he propose to conclude treaties containing such limitations. He made no distinction based on the citizenship of the decedent but rather referred to the "cases accruing of *persons* dying in the United States, & leaving heirs in Germany" as being balanced by the cases of "naturalized Germans, resident in the U. States, who are entitled to inherit the property of their *relations* deceased in Germany." Had the treaties not covered the case of inheritance by Americans from German citizens leaving

personal estates in Germany (and the converse case, now before this Court), the major objective of the treaties would in large measure have not been realized. Mr. Wheaton referred to the "vast" emigration going on from the German states to the United States, and, significantly, in illustrating the case in which a resident of the United States would profit, he mentioned the naturalized German who might inherit from his relations in Germany. If such an heir could inherit personalty only from "relations" in Germany who were American citizens, a class certainly not numerous, we would have profited little under the proposed treaties.

Nor did the Department of State, in responding to Mr. Wheaton, make nice distinctions with regard to the heirs to be benefited. He was instructed to take as his "general guide" the treaties with Prussia, the Hanseatic Republics and Hanover, the pertinent clauses of which are substantially identical with Article IV of the instant treaty of 1923. The object of the treaties was stated to be "the removal of all obstructions * * * to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by gift, contract, or will—or which they may have inherited *ab intestato.*" 4 Miller, *Treaties, etc., supra* 546, 548.

d. *Negotiations for the Treaty of 1848 with Austria.*—In Article XI of the Treaty of August

27, 1829, with Austria (8 Stat. 398, 401),[33] the form of the earlier treaties with Sweden and Norway was followed and realty and personalty were treated together, as "personal goods," in a single provision much like the instant paragraph with respect to personalty. In 1847 a revised extension of this treaty was negotiated, with the provisions of the Prussian, Wurttemberg and other German treaties as a model. Treaty of May 8, 1848, 9 Stat. 944; see 5 Miller, *Treaties, etc., supra,* 453, 456, 460.

In the course of the negotiations, both parties commented on Article XI of the earlier treaty in a manner showing that they understood it to provide for inheritance without distinction based on the citizenship of the decedent. The Austrian Government suggested that a proposed exemption, in the new treaty, from the *droit d'aubaine* and the *droit de detraction* not affect the restrictions imposed by local Austrian authorities. Secretary of State Buchanan responded, in a letter dated July 19, 1847, pointing out that Article XI of the existing treaty already

[33] "The citizens or subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament, or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges, only, as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

abolished these rights, without exception (5 Miller, *Treaties, etc.*, 457):

> The 11th Article of the existing Treaty of the 27th August 1829, provides fully and satisfactorily, throughout all the States of both parties, for the abolition of the droit d'aubaine and all discriminating taxes, so far as personal property is concerned. Although this Article is silent in regard to real estate or landed property [34], yet it is manifest that the same rule of justice ought to be applied to both kinds of property. Besides, the devise or descent of a real estate in Hungary to a citizen of the United States, will probably be an event of rare occurrence.

In compliance with this objection, the Austrian Charge d'Affaires abandoned his government's proposal and drafted an article to make explicit the reciprocal exemption. See 5 Miller, *Treaties, etc., supra,* 458. The draft provided (*ibid.*):

> The stipulation, contained in the XIth Article of the Treaty of Commerce and Navigation of the 27th August 1829,—that the subjects or citizens of both contracting parties shall have power to take possession and dispose, at their will, of any inheritance mutually accruing, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases,—shall

[34] Secretary Buchanan apparently believed that the phrase "personal goods" in Article XI did not comprehend real property. See p. 41, n. 26, *supra.*

> be applied to all cases of exportation of property from Austria to the United States of America and vice versa, in whatever way the exportation may take place, in consequence of the emigration of the owner, or of donation, or as marriage portion, or in any other way.

Apparently on Secretary Buchanan's motion, the reason for which does not appear, this Article was not included in the final treaty. See 5 Miller, *Treaties, etc., supra,* 459–460. The Secretary may have regarded it as unnecessary in view of the repetition of the former Article XI as Article I of the new treaty, and the insertion of a new Article II, which deals with realty in the language of the Prussian treaties and the instant treaty. 9 Stat 944. Plainly, however, this exchange of correspondence is a construction of Article XI of the 1829 Treaty as providing for the acquisition by the heir of any inheritance falling due to him without distinction based on the citizenship of the ancestor or donor. Thus both parties deliberately agreed upon a new treaty which they took to mean that the citizens of each should "have power to take possession and dispose, at their will, of any inheritance mutually accruing."

2. *The decision in Frederickson* v. *Louisiana.*— It is clear, then, that in 1860, at the time of the decision of the *Frederickson* case, the treaty provisions under discussion, including specifically the treaty with Wurttemberg, had consistently been understood as unqualifiedly per-

mitting the foreign heir to succeed to his inheritance or the proceeds thereof. This Court, not informed [35] of the history of the treaty provisions, adopted a contrary construction.

The testator in *Frederickson* v. *Louisiana* was a naturalized citizen of the United States, resident in Louisiana, and his legatees were citizens and residents of Wurttemburg. A Louisiana statute imposed a succession tax of 10 per cent on legatees not domiciled in Louisiana and not citizens of other states of the United States. Sec. 7, Act 315, 1855, Acts La., pp. 398, 399. The question was whether Article III of the Treaty of April 10, 1844, with Wurttemberg prevented application of the tax to the alien legatees. Article III provided (8 Stat. 588, 590):

> The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies, shall be liable to pay in like cases.

[35] The briefs, which are on file with the Court, contain no reference to the history of the provision.

This Court, affirming the judgment of the Supreme Court of Louisiana, held that the Louisiana statute did not discriminate between citizens of Louisiana and aliens, but rather applied to legatees domiciled abroad without regard to their citizenship. The legatees, were, therefore, regarded as subject only to such duties as were exacted from citizens under the same circumstances. The Court, speaking through Mr. Justice Campbell, went on to state that the treaty was inapplicable to estates of citizens residing at home (23 How. 445, 447–448):

> * * * But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not em-

> braced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana.

It is submitted that the historical material discussed above fully demonstrates the error of this decision and therefore of the cases which followed it (p. 38, *supra*). The error is confirmed by the severe criticism of the case by the Wurttemberg Government and by the position thereafter taken by the Department of State with respect to other treaties, particularly the Treaty of 1899 with Great Britain.

a. *The Wurttemberg Protest.*—The Louisiana tax upheld in the *Frederickson* case closely resembled the *droit de detraction,* one of the civil law taxes which these treaties had intended to abolish reciprocally, and it is small wonder that the Government of Wurttemberg filed a vigorous diplomatic protest against the decision. In a letter dated January 14, 1868, to Secretary of State Seward, the Consul-General of Wurttemberg, Leopold Bierwith, severely criticized the decision as contrary to the plain meaning of the treaty and called attention to the contrary interpretation followed by the Wurttemberg Government (11 Foreign Consuls in the United States, MSS., Nat. Archives):

> It would seem to be obvious that the heirs, legatees, and donees of citizens of the contracting parties are as fully under the provisions of this article as such citizens them-

selves, and that, to avoid doing violence to the terms of the compact, it must necessarily be held to provide that the heirs, legatees, and donees of citizens of each of the contracting parties, if themselves such citizens, shall succeed to the personal property of their ancestors, testators, and donors, paying such duties only as the inhabitants of the country where the property lies, shall be liable to pay in like cases. In other words, it would seem to have been unmistakably agreed that every subject of His Majesty is entitled to be placed on the same footing with an inhabitant of the United States; if he becomes the heir, legatee, or donee of a citizen of either of the contracting parties, in respect of personal property within the United States. And it would follow that a subject of His Majesty, answering to these conditions, is exempt from any tax from which any inhabitant in the United States is exempt in like cases.

The authorities of Wurttemberg, judicial as well as executive and legislative, have invariably adhered to this construction sustained as it is by the context of the treaty, which in its second article [relating to realty] declares that * * *

* * * * *

Under this reading of the treaty, the personal property of Wurttembergers descending to persons belonging to the United States, has always been exempt from the payment of duties of detraction, whether situate in the one country or in the

> other. * * * It (the treaty) was interpreted as having been made rather for the benefit of the living than for that of the dead; rather for the advantage of the heirs, legatees, and donees, than for that of the decedents and donors; and if the former were intended to be relieved from the payment of duties of detraction, it could make no difference to them, whether the foreign country whence their inheritance came, was or was not the native country of the intestate from whom they derived it.

The succeeding Secretary, Hamilton Fish, replied that his Government was bound by the decision of the Supreme Court and suggested, as had his predecessor, that a new treaty be concluded to express the views of the Wurttemberg Government.[36]

A proposed new clause was drafted by the Wurttemberg Government and its substance was agreed to by Mr. Fish,[37] but the inclusion of Wurt-

[36] Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U. S. 140, MSS., Nat. Archives; Instruction, Seward to Bancroft, Minister to Prussia, Aug. 18, 1868, 15 Instructions to Prussia, No. 75, p. 2, MSS., Nat. Archives. See Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873) 159.

[37] Despatch, Bancroft to Fish, Nov. 29, 1869, 16 Despatches, Prussia, No. 52, MSS., Nat. Archives; Instructions, Fish to Bancroft, Dec. 21, 1869, Jan. 24, 1871, 15 Instructions to Prussia, No. 168, p. 99, No. 193, p. 121, MSS., Nat. Archives. The proposed clause provided (Despatch, Bancroft to Fish, *supra*):

> "The citizens of each of the contracting parties, where an inheritance falls to them ab intestate or by testament or donation in the personal property of a citizen of the other

temberg in the German Empire in 1871 apparently ended the matter.[38]

b. *Constructions by the Department of State—i. The Swiss and Russian Treaties.*—After this Court's decision in the *Frederickson* case, the Department of State took the view we advance in this brief in connection with Article V of the Treaty of November 25, 1850, with Switzerland (11 Stat. 587, 590).[39] That Article is substantially identical with the personalty clauses of both the

---

contracting party, shall succeed to the said personal property in all cases without regard to the country in which such testamentary disposition or donation may have been made and in whichever of the two countries the personal property so falling to them by intestacy or by will or donation may lie, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

[38] It may also be noted that in 1868 the Louisiana court held that the treaty of 1845 with Bavaria (9 Stat. 826, 827), identical with the Wurttemberg treaty, exempted Bavarian heirs from the tax applied in the *Frederickson* case. *Succession of Crusius*, 19 La. Ann. 369. The opinion neither cites the *Frederickson* case nor does it reveal the citizenship of the decedent. Secretary of State Fish, however, pointed out to the Wurttemberg Government that this decision might mean that the Louisiana authorities would no longer construe the treaty as they had in *Frederickson's* case. Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U. S. 140, MSS., Nat. Archives.

[39] "The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successor, being citizens of the other party, shall succeed to the said property or inherit it * * *."

Wurttemberg Treaty and the instant treaty of 1923. In 1868, a dispute arose concerning the inheritance by a United States citizen of the personal property of his Swiss maternal grandfather, located in the canton of Aargau. The cantonal authorities had refused to allow the American's claim on the ground that he was not a legitimate heir since his mother, a Swiss citizen, had not married in accordance with Swiss laws. In submitting the dispute to the High Federal Council of Switzerland, the American Minister at Berne argued that the question of the legitimacy of the claimant should be determined by the law of the United States and that, as an American citizen, the claimant "is justly entitled under the treaty to succeed to the property in question, and to take possession thereof by the attorney duly appointed for that purpose." *Diplomatic Correspondence of the United States, 1868,* Part II, 194, 196. The Council held that United States law governed the question of legitimacy but also observed that by virtue of the treaty of 1850 "an American citizen has the right, in case of successions, to be treated as a Swiss." While the major issue was the legitimacy of the American claimant, our minister and the Swiss authorities agreed that, assuming the claimant's legitimacy, the treaty put American citizen heirs on the same footing with Swiss heirs, and that they could therefore inherit from Swiss citizens. *Ibid.*, 197.

When in the next decade the same question arose, this Government again interpreted the treaty provision in this manner.[40] In 1880 it appeared that local Swiss authorities had detained personal property left by a Swiss to a naturalized American citizen of Swiss origin on the ground that since the claimant had not obtained the consent of the canton to his naturalization, his status as an American citizen would not be recognized. In instructing our minister at Berne to press the claim of the American heir, Secretary Evarts said (*Foreign Relations of the United States, 1880,* 952, 953):

> Again, the fifth article [of the 1850 treaty] stipulate in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

And in 1877 the Secretary took the same position, under the similar treaty with Russia (8 Stat. 444, 448), with respect to the rights of Russian heirs in the United States. In an instruction to our Minister to Russia, he stated that under Article X of our treaty of December 18, 1832, with that country, "Russian subjects may inherit the per-

[40] These constructions of the Swiss treaty were judicially confirmed in 1883 in *Jost* v. *Jost*, 1 Mackey (12 D. C.) 487, in which the Supreme Court of the District of Columbia held that under Article V of the 1850 treaty, Swiss heirs could inherit the personal estate of an American citizen decedent. The other state cases reaching the same result were decided in the present century. See *supra*, p. 39, n. 23.

sonal estate of decedents in the United States and may take possession thereof, by themselves or by others." 4 Moore, *Digest of International Law* (1906) 6.

ii. *The British Treaty of 1899.*—The Louisiana tax statute applied in the *Frederickson* case was repealed in 1877[41] and, as has been shown, for the remainder of the century all the rulings were in support of the right under these treaties of an alien heir to inherit personal property from a citizen decedent. In 1894, however, the Louisiana statute was reenacted[42] and during its four-year life[43] it precipitated the negotiations for what became the Treaty of March 2, 1899, with Great Britain on the subject of reciprocal inheritance rights. 31 Stat. 1939. The negotiations for this treaty show that although the language used was that of the Wurttemberg and Prussian treaties, the treaty was deliberately intended to override the Louisiana statute. The construction placed by the parties on the personalty clause is, therefore, additional evidence that the clause should not be taken to exclude the case of the alien inheriting personal property

[41] Act 86, 1877 La. Acts 125.

[42] Act 130, 1894 La. Acts 165.

[43] The statute was declared unconstitutional in 1898 as in violation of the provision in the Louisiana Constitution requiring that revenue bills originate in the lower House. *Succession of Sala*, 50 La. Ann. 1009. It was not thereafter reenacted.

in this country from an American citizen decedent.

On September 24, 1895, Sir Julian Pauncefote, the British Ambassador in Washington, wrote to Secretary of State Olney as follows (125 Notes from Great Britain, MSS., Nat. Archives):

> A recent enactment of the State Legislature of Louisiana imposing a 10 p/c duty on property inherited by foreigners resident abroad, has drawn the attention of Her Majesty's Government to the present position of British or American subjects, as the case may be, succeeding to property situated in the United States or Great Britain, respectively. There are no existing Treaty arrangements between the two countries for protecting this class of persons from differential legislation directed against them.
>
> * * * * *
>
> I am accordingly to ascertain whether the United States Government would be willing to sign a short convention, declaring:
>
> (1) that no greater charges shall be imposed in the way of succession, probate or administration duties on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed on property inherited by American citizens * * * with provisions securing reciprocal advantage in Great Britain * * * to citizens of the United States.

Although such records of the negotiations as have been preserved disclose no further reference to the Louisiana statute, it is clear that the provisions of the treaty relating to personalty were based on a draft prepared by this Government in response to Sir Julian's letter.[*] Both the draft and the final treaty relate solely to reciprocal inheritance rights and the representation of decedents by consuls of their nationality. Article I provides for the inheritance of real property, in the language of the Prussian and Wurttemberg treaties. Article II, dealing with personal property, also follows the earlier treaties (31 Stat. 1939):

> The citizens or subjects of each of the Contracting Parties shall have full power to

[*] On January 18, 1896, Sir Julian wrote to Secretary Olney referring to the hardships imposed upon British subjects by the laws in force in the United States prohibiting the ownership of real property by aliens. He suggested the conclusion of a treaty granting most-favored-nation privileges with respect to "the tenure, disposition and transmission of real property." 126 Notes from Great Britain, MSS., Nat. Archives. On May 20, 1896, he wrote a third letter, referring to his two earlier letters and requesting the decision of the Government of the United States in regard to the proposals made in the letters. *Ibid.* The first draft of the convention was submitted to the British Ambassador by Secretary of State John Hay on December 9, 1898. 24 Notes to Great Britain 541, MSS., Nat. Archives. Various changes were recommended by the British Foreign Office. Letter, Pauncefote to Hay, 130 Notes from Great Britain, Feb. 16, 1899, MSS., Nat. Archives. These were incorporated. The draft of Article II appeared substantially in what became its final form, the only change being the substitution of the word "territories" for the proposed word "States."

> dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

There is no evidence that the State Department representatives who drafted Article II, or the British representatives who agreed to it, were mindful of the decision in *Frederickson* v. *Louisiana*. Their failure to vary the treaty language explicitly to avert the ruling of that case suggests that they were not. Their adoption of the language of Article II without substantial change from the Wurttemberg form,[15] therefore, demonstrates that they held a view with respect to the treaty language opposite to that expressed in the *Frederickson* opinion.

---

[15] The only language in Article II not found in the earlier treaties is the description of the heirs as "whether resident or non-resident." This new phrase merely emphasized the application of the treaty to British citizens wherever resident and could not of itself have been meant to overrule the *Frederickson* decision. If, however, the presence of this phrase is believed to make the *Frederickson* decision inapplicable, that conclusion applies as well to the instant case, since Article IV of the instant treaty with Germany likewise contains such language.

The Louisiana statute which suggested the need for a treaty was understood, according to the British Ambassador's letter, as referring to inheritance by "foreigners resident abroad." That statute had directed his concern to the position of "British or American subjects, as the case may be, succeeding to property situate in the United States or Great Britain, respectively." No existing treaty between the countries, he pointed out, protected "this class of persons from differential legislation directed against them." And in his specific proposal for a clause respecting taxes on succession (broadened in the treaty to apply as well to the privilege of succession), the Ambassador referred to real or personal property in the United States "inherited by British subjects, whether domiciled within the union or not." Plainly, the British Ambassador was making no distinction among the class of British aliens who might succeed to property in the United States. He was seeking a treaty under which property in this country would descend to British citizens without regard to such factors as the citizenship of the decedent. And this Government, having presented a draft treaty to accomplish this purpose, should be held to have acquiesced in the British understanding. *Cf. Hauenstein* v. *Lynham*, 100 U. S. 483, 486–487.

Article IV of the Treaty of 1923 with Germany should be similarly construed.

II

APART FROM ARTICLE IV OF THE TREATY, THE CALIFORNIA STATUTE IS INVALID AS AN INVASION OF THE FEDERAL FIELD OF CONTROL OVER FOREIGN AFFAIRS

Aside from the questions of the effectiveness and construction of the treaty with Germany, the California statute is invalid as an extension of state power into the field of foreign affairs, exclusively reserved to the Federal Government.

As amended in 1945,[46] the statute provides, in part (*infra*, p. 83):

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents

[46] It is here assumed that the statute as amended in 1945 is applicable to this case. The original statute was invalid for additional reasons. As enacted in 1941, the statute conditioned the rights of alien heirs not only upon proof of reciprocal inheritance rights of United States citizens in the country of the alien's residence but on the right of United States citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir. California Statutes, 1941, Chapter 895. The second condition was clearly invalid as a regulation of foreign commerce. *Cf. Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59.

> and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents.

Though ostensibly a regulation of the inheritance rights of aliens, the statute seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an exchange of rights is a matter for settlement by the Federal Government by treaty on a nation-wide basis, and not for separate state action.

This very subject — reciprocal inheritance rights—has been the subject of a large number of treaties concluded by the United States. See Appendix C, p. 93, *infra*. The California statute and similar statutes enacted in a few other states[47]

[47] Arizona, 3 Ariz. Code 1939, Sec. 39–111; Montana, 4 Rev. Code Mont., 1939 Supp., Sec. 10333.2; Nevada, 2 Nev. Comp. Laws Supp. 1931–1941, Sec. 9894; Oklahoma, Okla. Stats. Ann. Perm. Ed., Tit. 60, Sec. 1213; Oregon, 5 Ore. Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167 and 177. See also 2 Gen. Stats. of Conn. (1930) Rev., Sec. 5055.

are in substance invitations to foreign countries to trade inheritance rights abroad for inheritance rights in these states. If a foreign country grants American citizens the right to inherit abroad, the California legislature undertakes in return to grant residents of such country the right to inherit in California. The statute has the same objective as the existing reciprocal inheritance rights treaties and must, therefore, be regarded as an indirect attempt to negotiate with foreign countries and as an attempted duplication of the treaty-making program. *Hines* v. *Davidowitz,* 312 U. S. 52. The power of the states severally to negotiate with foreign countries never existed before (*United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 316, 317) and plainly could not exist after the adoption of the Constitution, which unqualifiedly reserved the treaty-making power to the Federal Government and expressly forbade it to the states. *Hauenstein* v. *Lynham,* 100 U. S. 483, 490; 8 Op. A. G. 411, 415–416. While no case has been found involving an attempt by a state, either directly or indirectly, to make foreign arrangements for reciprocal inheritance rights, it was early recognized that such an effort would be beyond the state's power (*People* v. *Gerke and Clark,* 5 Cal. 381, 385) as are all efforts of a state to engage in foreign relations. Cf. *United States* v. *Rauscher,* 119 U. S. 407, 414; *Holmes* v. *Jennison,* 14 Pet. 540, 572; *People ex rel. Barlow*

v. *Curtis,* 50 N. Y. 321, 329. In *Hines* v. *Davidowitz, supra,* at p. 64, this Court, speaking through Mr. Justice Black, commented on the continuous recognition given to the supremacy of the national power in the field of foreign affairs. The national interest, wrote Mr. Justice Black, "imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference." *Ibid.,* at p. 63. See also *United States* v. *Belmont,* 301 U. S. 324, 331; *United States* v. *Pink,* 315 U. S. 203, 222–223, concurring opinion of Mr. Justice Frankfurter, at pp. 238–242.

The court below seems to have been of the view that California was not attempting to trade inheritance rights with foreign countries and that the statute was no more than an exercise of the state's undoubted power to regulate the succession to property (R. 35).[48] *Blythe* v. *Hinckley,* 180 U. S. 333, 341–342; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562.

We may assume, for the purpose of this case, that in the absence of treaty California may properly deny all aliens the right to inherit. *Terrace* v. *Thompson,* 263 U. S. 197, 217. The instant statute is, however, more than a mere denial of inheritance rights to aliens; it conditions the grant or denial on the extension

[48] Two decisions of intermediate courts in California, now pending in the Supreme Court of California after argument, are in accord. *Estate of Alfred Karl Knutzen,* 70 A. C. A. 856, 161 P. 2d 598; *Estate of Bevilacqua,* 70 A. C. A. 679, 917, 161 P. 2d 589.

of similar rights by the country of the alien's residence. The extension of inheritance rights to American citizens by foreign countries is not a proper objective of state legislative action. The right of American citizens to inherit property abroad is a matter for international negotiation by the Federal Government, and a State cannot make it the condition on which it will permit aliens to inherit. *Cf. Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280. The protection of the persons of our citizens abroad has been described as "one of the most important and delicate of our international relationships." *Hines* v. *Davidowitz, supra*, at p. 64. The protection of their property rights abroad is of like order of importance and delicacy and no less the exclusive province of the Federal Government.

Moreover, the enforcement of the California statute and the other similar statutes can affect our foreign relations only adversely. These statutes will have little legal significance with respect to those countries with which we have concluded treaties for reciprocal inheritance rights. The guarantee of inheritance rights in such treaties will be recognized as overriding the restrictions which the statutes purport to impose.[40] With re-

[40] The Attorney General of Oregon has so held, with respect to Germany, Italy, Sweden, Norway, Yugoslavia and Spain, in a series of opinions issued under the Oregon statute (*supra*, p. 69, n. 47). *Report and Opinions of the Attorney*

spect to the countries with which we have no such treaty, however, the statutes may well be productive of unfortunate controversies between foreign governments and those who seek to invoke the statutes to the detriment of the foreign heirs. These statutes do not merely deny all aliens the right to inherit, a denial which would perforce be accepted by the foreign governments as a nondiscriminatory expression of the domestic policy of the respective states. The statutes rather pick and choose among classes of aliens, the standard being the reciprocal treatment of American citizens in the home country of the alien. In order to apply the statutes, the state authorities must, therefore, sit in judgment on the treatment of inheritance rights of American citizens by the respective foreign governments.

During this war, the courts of Montana and California have passed on the existence of reciprocal inheritance rights in The Netherlands, Denmark and Greece. The Supreme Court of Montana has held that the testimony of the legal counselor of the Danish Legation that reciprocal rights existed in Denmark was sufficient support for findings of fact favorable to the Danish heirs. *Re Nielsen's Estate*, 165 P. 2d 792. In *Estate of Blak*, 65 C. A. 2d 232, the California District Court of Appeal accepted as conclusive the statement of the Ambassador of The Netherlands

---

General of Oregon, 1936–1938, p. 375; *ibid., 1938–1940*, pp. 32, 136, 173.

that reciprocal rights existed in his country. In *Estate of Corcofingas,* 24 Cal. 2d 517, the Greek Consul and the Alien Property Custodian jointly made efforts to show, on behalf of Greek heirs, that reciprocal rights existed in Greece. Their efforts failed for procedural reasons. See record in this Court in *Markham* v. *Kallimanis,* 327 U. S. 788, No. 774, Oct. Term, 1945. And before the outbreak of war, the Attorney General of Oregon passed on the existence of inheritance rights in American citizens in Greece, Russia and Mexico. Relying on information as to the foreign law furnished through diplomatic channels, he held that reciprocal rights existed in Mexico and in Greece, but not in Russia, for the reason that the Russian export currency law would prevent an American heir from receiving payment in the United States of the proceeds of a Russian estate. *Report and Opinions of the Attorney General of Oregon,* 1938–1940, pp. 22, 313, 93.

Foreign governments cannot help being concerned that their laws and customs are thus reviewed by local authorities. Such a review, even where it can be shown that rights of inheritance are extended to American citizens as a matter of course,[50] may provoke resentment. And any decisions adverse to foreign governments

[50] In *Re Nielsen's Estate, supra,* the legal counselor of the Danish Legation testified that while there was no Danish statute or case law expressly permitting United States citizens to take estates in Denmark, that principle is implied in

may, justifiably or not, be regarded as discriminatory. In any event, by imposing upon representatives of foreign governments, to whom the implications of our federal-state judicial system are not always clear, the burden of supporting their nationals in various state courts, the statutes will be a recurrent source of diplomatic friction.

III

IF THE CALIFORNIA STATUTE IS VALID THE COURT BELOW ERRED IN HOLDING THAT THE CUSTODIAN HAS THE BURDEN OF PROOF UNDER IT

In the event that the preceding arguments are rejected and the California statute found valid and effective, it should properly be construed as imposing on the respondent heirs the burden of proof of the nonexistence of reciprocal inheritance rights. As enacted in 1941, Section 259 of the California statute had stated the limitations on inheritance and Section 259.1 had provided, in part, that "The burden shall be upon such nonresident aliens to establish the fact of the existence of the reciprocal rights set forth in

---

the disposition of "thousands of estates." He stated (165 P. 2d at p. 794):

"To make myself more clear, I may perhaps add that the idea that residents of the United States should have an inferior position to citizens or residents of Denmark regarding their rights of inheritance in the estates in Denmark, is so alien to the Danish legal mind and the Danish legal system, that one could just as well search for opinions by Danish courts or Danish statutes stating say, that blind or red-haired people have full right of inheritance."

Section 259." Ch. 895, Calif. Stats., 1941. In 1945, Section 259.1 was repealed and Section 259 was amended (Ch. 1160, Calif. Stats. 1945, *infra*, pp. 83–84). As amended, Section 259 provides in part as follows:

> It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution * * * a petition is filed by any person interested in the estate requesting the court to find that * * * such reciprocal rights * * * do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal * * * rights shall be upon the petitioner.

In the concluding words of its opinion (R. 40), the Circuit Court of Appeals apparently held that, despite this amendment to the statute, the Custodian, as plaintiff, must assume the burden of proving reciprocity on the remand of this case. This holding, made without any reference to California law, is contrary to the terms of the statute and to California decision law generally.

In this federal proceeding to determine the interests in the estate, the state rule as to the location of the burden of proof is controlling. *Palmer* v. *Hoffman,* 318 U. S. 109; *Cities Service Co.* v. *Dunlap,* 308 U. S. 208. See *Guaranty Trust Co.* v. *York,* 326 U. S. 99. Particularly

should this be so where, as here, the right sought to be established by the respondent heirs is founded upon a state statute and the statute establishing the right defines the method of proving the facts necessary to support it.

The amended statute clearly creates a presumption that reciprocal rights exist and equally clearly places the burden of establishing the contrary upon the persons who request a finding that such rights do not exist. That burden cannot shift from the respondents to the Custodian merely because the Custodian instituted this suit. The statute does not impose the burden on a person because he is the moving party but rather establishes a presumption generally applicable to succession of property, which can be rebutted only if a "person interested in the estate" requests the probate court to find, and assumes the burden of proving, that reciprocal rights do not in fact exist in the country in question. The Custodian is entitled to rely on the presumption and the respondents are the persons "interested" who must bear the statutory burden if the statute is found to be valid and the case remanded for further proceedings. In holding that the Custodian still has the burden, the court below called for proof of what is explicitly presumed by the statute itself.

The respondents contend (Brief in opposition, p. 11) that the decision of the court below must be read as declaring the amended statute inappli-

cable because enacted subsequently to the decedent's death. The court neither stated that this was its decision nor did it cite or discuss any of the California precedents relevant to the applicability of this type of statute to pending cases. While the question of the applicability of the amendment of Section 259 has not been decided by a California appellate court,[51] an examination of the relevant precedents demonstrates that the holding found by the respondents in the opinion would be erroneous.

Statutes relating to remedy have frequently been held by the California courts to be applicable to existing causes of action even if already in litigation prior to the effective date of the statute. *Sour* v. *Superior Court,* 1 Cal. 2d 542; *Heron* v. *Bray,* 122 C. A. 79. The rule in California, as approved by the Supreme Court of

[51] The Supreme Court of California has under consideration two cases in which the Custodian has urged the applicability of the amendment to Section 259 to cases pending on appeal at the time of the enactment. *Estate of Knutzen,* 70 A. C. A. 856, 161 P. 2d 598; *Estate of Bevilacqua,* 70 A. C. A. 679, 917, 161 P. 2d 589. The amendment, though enacted after the death of the decedent involved, has been held applicable at trial in four cases: *Estate of Natale Achille,* Superior Court, Alameda County, No. 89798; *Estate of Paul Hess,* Superior Court, Los Angeles County, No. 231375; *Estate of Henry Sternberg,* Superior Court, Los Angeles County, No. 232075; *Estate of Emanuel Roth,* Superior Court, Los Angeles County, No. 220049. It has been held inapplicable in *Estate of Giordano,* Superior Court, Fresno County, Dept. 2, No. 19022.

California in *San Bernardino County* v. *Industrial Accident Comm.*, 217 Cal. 618, 629, is:

> When a law only affects the remedy or procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation.

The amendment of 1945, shifting the burden of proof, is clearly a law affecting the remedy within the meaning of this rule. The purported substantive right of the respondents to inherit in place of the beneficiaries named by the decedent continued as before. Only the method of establishing the right was changed. The California courts have consistently, although in other contexts, treated the location of burden of proof as a procedural matter. *Tevis* v. *Pitcher*, 10 Cal. 465; *MacArthur* v. *Industrial Acc. Comm.*, 220 Cal. 142. While we have found no California case explicitly holding that a statutory change in the location of the burden of proof is to be applied to pending cases, statutes changing methods of proof have frequently been held applicable to pending cases. *California Employ. Stabilization Comm.* v. *Smileage Co.*, 68 C. A. 2d 249 (*prima facie* effect of report filed with administrative agency); *Arques* v. *National Superior Co.*, 67 C. A. 2d 763 (admissibility of business record to prove cause of

action). See *Vanderbilt* v. *All Persons, etc.*, 163 Cal. 507 (abstract of title made *prima facie* evidence of title). In other states, statutes shifting the burden of proof have uniformly been held to be applicable to cases pending at the time of enactment. *Sackheim* v. *Pigueron*, 215 N. Y. 62; *Southern Indiana R. Co.* v. *Peyton*, 157 Ind. 690; *Wallace* v. *Western N. C. R. Co.*, 104 N. C. 442; *Easterling Lumber Co.* v. *Pierce*, 106 Miss. 672, affirmed, 235 U. S. 380. See *Sampson* v. *Channell*, 110 F. 2d 754 (C. C. A. 1). Only in New Hampshire, which does not follow the California rule that procedural statutes are applied to pending actions, has it been held that a statute shifting the burden of proof is inapplicable to a pending case. *Murphy* v. *Railroad*, 77 N. H. 573.

The conclusion of the court below that the Custodian would have the burden, on remand of this case, of proving the existence of reciprocity may rest, as the respondents contend, on the court's belief that the statute does not apply to cases pending at the time of enactment. If so, the California decisions are to the contrary. In any event, there was error in the court's failure to examine the relevant state law. *Griffin* v. *McCoach*, 313 U. S. 498; *Pecheur Co.* v. *Nat. Candy Co.*, 315 U. S. 666. See *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 496; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496. If the court has recognized the applicability in this case of the amendment to

Section 259, it has erred in disregarding the plain direction of that amendment, which places the burden of proving non-reciprocity upon the California claimants. In either case, its decision on this point should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
HARRY LEROY JONES,
M. S. ISENBERGH,
Special Assistants to the Attorney General.
DAVID SCHWARTZ,
ARMAND DUBOIS,
DAVID E. FELLER,
Attorneys.

MARCH 1947.

APPENDIX A

Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality whether resident or non-

resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presump-

> tion shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

APPENDIX B

Letter from Acting Secretary of State Grew to Attorney General Biddle, dated May 21, 1945:

In reply refer to
Le 740.00113 EW
/4–1245

DEPARTMENT OF STATE,
Washington, May 21, 1945.

MY DEAR MR. ATTORNEY GENERAL: I refer to your letter of April 12, 1945 transmitting a copy of the appellee's brief in the case of *Allen et al.* v. *Markham, Alien Property Custodian,* pending before the United States Circuit Court of Appeals for the Ninth Circuit, in which you state that the Department of Justice is contending that the provisions of Articles I and IV of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed December 8, 1923, "have not been abrogated by the war, but are still effective". You inquire whether the Department of State concurs in the position which you are advancing on this point.

It appears that the case relates to the inheritance of land in California from a decedent who died June 6, 1942, that the Alien Property Custodian has vested the interests in such land of certain German nationals resident in Germany, and that the Alien Property Custodian and the Department of Justice contend that provisions of Article IV of the Treaty remained in effect despite the outbreak of war and therefore entitled the German heirs to inherit the interest which has been vested by the Alien Property Custodian.

Article I of the Treaty covers a broad field, conferring upon nationals of each High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.

It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled. As the Supreme Court stated in *Karnuth* v. *United States ex rel. Albro,* 279 U. S. 231, 236 (1929):

"The effect of war upon treaties is a subject in respect of which there are widely divergent opinions * * *. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making * * *".

Speaking through Judge Cardozo, the New York Court of Appeals said in *Techt* v. *Hughes,* 229 N. Y. 222, 240; 128 N. E. 185, 191 (1920, certiorari denied, 254 U. S. 643):

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came * * *. The writers of our own time reject these sweeping statements * * *. International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically,

preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules".

After enumeration of various types of treaty provisions, Judge Cardozo added that the "principle or standard" is "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected". Judge Cardozo then pointed out the difference between the effect of war in giving the belligerent government the privilege of terminating the treaty provisions, and termination *ipso facto* by the outbreak of war. He reiterated that the function of the courts was "to determine whether, alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act" (128 N. E. 185, 192).

In *Karnuth* v. *United States ex rel. Albro, supra,* the Supreme Court appears to have applied a somewhat similar test, in holding that the War of 1812 had terminated the provision of Article III of the Jay Treaty conferring the right "freely to pass and repass" into the territories of the two parties on the American continent. Contrasting this provision with the right to hold lands and dispose thereof accorded under the Treaty of Peace of 1783 and confirmed by Article IX of the Jay Treaty, the court said:

"It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility" (279 U. S. 231, 239).

In the *Sophie Rickmers,* 45 F. (2d) 413 (S. D. N. Y. 1930), Circuit Judge Julian Mack held that the outbreak of war in 1917 between the United States and Germany did not terminate or suspend the provision of Article II of the Treaty of Commerce and Navigation of 1828 between the United States and Prussia to the effect that Prussion vessels should be entitled to the same treatment as American vessels in matters of tonnage taxes. He quoted with approval Judge Cardozo's language in *Techt* v. *Hughes, supra,* and added:

"The criteria of judgment must then be pragmatic" (p. 419). Distinguishing the factual situation from that in the *Karnuth* case, *supra,* he said: "Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied" (p. 421).

Applying the principles of these decisions to Article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, et cetera. On the

other hand, there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war.

A provision in a treaty with Austria-Hungary similar to Article IV was held effective during wartime in *Techt* v. *Hughes, supra,* in which Judge Cardozo laid down the principle quoted and said:

"I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it. * * *

"The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. c. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations" (128 N. E. 185, 192). Referring to the statements that treaties of commerce were suspended or abrogated by war, he added:

"Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch

commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on guard against being misled by labels * * *. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations" (*ibid.*, 193).

This case was followed in *State ex rel. Miner* v. *Reardon*, 120 Kans. 614, 245 Pac. 158 (1926), in which the court said with respect to a treaty provision that aliens might inherit:

"if it is to survive a declaration of war it must be upon other grounds; that is, an inference that it is intended to be enforced notwithstanding the parties are at war must be based upon different considerations. Upon the grounds indicated in the opinion in the *Techt-Hughes* case we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace" (p. 159). The Supreme Court of Nebraska came to the same conclusion in *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13 (1929), in which the court said of a treaty provision regarding the disposition and inheritance of property:

"* * * the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the

progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war" (p. 16).

While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: * * * provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" (279 U. S. 231, 236–237).

Although Secretary of State Lansing wrote on September 10, 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary (1918 For. Rel. Supp. 2, p. 309), that statement was made prior to the judicial decisions discussd herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognizing greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

It may be observed that the courts of this country appear to have taken a position somewhat more favorable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among the modern

writers there appears to be a trend in favor of the view that "the element on which must depend an answer to the question whether or not particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself." (Sir Cecil Hurst, "The Effect of War on Treaties," 1921–1922 British Year Book of International Law, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed. 1945) volume II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties,* 29 A. J. I. L. Supp. (1935), 1183 *et seq.* There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that Article IV of the Treaty of December 8, 1923 with Germany remains in effect despite the outbreak of war.

Sincerely yours,

JOSEPH C. GREW,
Acting Secretary.

The Honorable FRANCIS BIDDLE,
Attorney General.

APPENDIX C

Chronological list of treaties containing a clause similar to paragraph one of Article IV, Treaty of 1923 with Germany, relating to real property. Most of these clauses also contain language similar to paragraph two of Article IV, relating to personal property. Where the personalty clause appears in a separate article, the citation to that article is also given.

Country	Date	Article	Statutes at Large
Prussia	Sept. 10, 1785	X	8: 84, 88.
Spain	Oct. 27, 1795	XI	8: 138, 144.
Prussia	July 11, 1799	X	8: 162, 166.
Colombia	Oct. 3, 1824	IX	8: 306, 308.
Central America	Dec. 5, 1825	XI	8: 322, 326.
Hanseatic Republics	Dec. 20, 1827	VII	8: 366, 370.
Prussia	May 1, 1828	XIV	8: 378, 384.
Brazil [1]	Dec. 12, 1828	XI	8: 390, 392.
Chile	May 16, 1832	IX	8: 434, 435.
Russia	Dec. 18, 1832	X	8: 444, 448.
Venezuela	Jan. 20, 1836	XII	8: 466, 470.
Peru-Bolivian Federation	Nov. 13, 1836	VIII	8: 487, 489.
Sardinia	Nov. 26, 1838	XVIII	8: 512, 520.
Ecuador	June 13, 1839	XII	8: 534, 538.
Hanover	May 20, 1840	VII	8: 552, 556.
Portugal	Aug. 26, 1840	XII	8: 560, 566.
Hesse	Mar. 26, 1844	II and III	9: 818.
Wurttemberg	Apr. 10, 1844	II and III	8: 588.
Bavaria	Jan. 21, 1845	II and III	9: 826, 827.
Saxony	May 14, 1845	II and III	9: 830.
Nassau	May 27, 1846	II and III	9: 849, 850.
Hanover	June 10, 1846	X	9: 857, 865.
Oldenburg [2]	Mar. 10, 1847		9: 868.
Swiss Confederation	May 18, 1847	I and II	9: 902.
Mecklenburg-Schwerin	Dec. 9, 1847	X	9: 910, 918.
Austria	May 8, 1848	I and II	9: 944.
Guatemala	Mar. 3, 1849	XI	10: 873, 877.
Hawaii	Dec. 20, 1849	VIII	9: 977, 979.
Swiss Confederation	Nov. 25, 1850	V	11: 587, 590.
Peru	July 26, 1851	XV	10: 926, 932.
Brunswick and Luneberg	Aug. 21, 1854	I and II	11: 601.
Bolivia	May 13, 1858	XII	12: 1003, 1018.
Venezuela	Aug. 27, 1860	V	12: 1143, 1146.
Dominican Republic	Feb. 8, 1867	V	15: 473, 476.
Nicaragua	June 21, 1867	VIII	15: 549, 553.
El Salvador	Dec. 6, 1870	XXVIII	18 (3): 725, 738.
Orange Free State	Dec. 23, 1871	III	18 (2): 580, 581.
Great Britain [1]	Mar. 2, 1899	I and II	31: 1939.
Guatemala [1]	Aug. 27, 1901	I and II	32: 1944, 1945.
Spain [1]	July 3, 1902	III	33: 2105, 2107.

See footnotes at end of table.

Country	Date	Article	Statutes at Large
Canada [1] [2]	Oct. 21, 1921		42: 2147.
Germany [1]	Dec. 8, 1923	IV	43: 2132, 2135.
Hungary [1]	June 24, 1925	IV	44: 2441, 2443.
Esthonia [1]	Dec. 23, 1925	IV	44: 2879, 2880.
El Salvador [1]	Feb. 22, 1926	IV	46: 2817, 2820.
Honduras [1]	Dec. 7, 1927	IV	45: 2618, 2620.
Latvia [1]	Apr. 20, 1928	IV	45: 2641, 2642.
Norway [1]	June 5, 1928	IV	47: 2135, 2136.
Austria	June 19, 1928	IV	47: 1876, 1879.
Poland [1]	June 15, 1931	IV	48: 1507, 1510.
Danzig [4]	Mar. 9, 1934		48: 1680.
Finland [1]	Feb. 13, 1934	IV	49: 2659, 2662.

[1] In force in December 1941. See *Treaties in Force, a List of Treaties and Other International Acts in Force on Dec. 31, 1941*, State Dept. Pub. No. 2103, 1944, pp. 138, 139, 146, 148, 149, 151, 154, 155, 156, 158, 160, 161, 222, 223, 224, 225. This listing is stated not to be an expression of opinion as to the effect of the war on the treaties in force. *Ibid.*, pp. ii, iii.

[2] Accession to Treaty of June 10, 1846, with Hanover.

[3] Accession to Treaty of Mar. 2, 1899, with Great Britain.

[4] Accession to Treaty of June 15, 1931, with Poland.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

In the Supreme Court

OF THE

United States

NOV 29 1946

OCTOBER TERM, 1946

No. 626

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH WAHRHAFTIG,
Russ Building, San Francisco, California,
Attorney for Respondents.

ROBERT W. KENNY,
Attorney General of the State of California,
EVERETT W. MATTOON,
Deputy Attorney General of the State of California,
600 State Building, Los Angeles, California,
Amici Curiae.

S. C. MASTERSON,
413 Tenth Street, Richmond, California,
MATT WAHRHAFTIG,
Bank of America Building, Oakland, California,
JOSEPH GENSER,
413 Tenth Street, Richmond, California,
Of Counsel.

PARNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Treaty and statutes involved	2
Statement	3
Reasons for denying the writ	3
Conclusion	12
Appendix	i-iv

Table of Authorities Cited

Cases	Pages
Allen v. Markham, 156 F 2d 653, 663	3
Bevilacqua, Estate of, 70 ACA 679, 161 P 2d 589	7
Brenham v. Story, 39 Cal. 179	11
Chinese Exclusion Case, 130 V. J. 581	9
Irving Trust Co. v. Day, 314 V. J. 556, 562	4
Knutzen's Estate, In re, 70 ACA 856, 161 P 2d 598	6
Techt v. Hughes, 229 N. Y. 222	8
Terrace v. Thompson, 263 V. J. 197	4
United States v. White Dental Co., 274 V. J. 398, 402, 403	10
Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349	11
Whitney v. Robertson, 124 V. J. 190	9

Treaties	
Germany, December 8, 1923, Art. IV, 44 Stat. 2132, 2135	2, 5, 6, 8, 9, 10
Germany, December 8, 1923, Arts. I, XII, XIII, and XXIV, 44 Stats. 2132	6

Federal Statutes	
Estate Tax Law, 26 U.S.C.A. Section 813(b)	7
Judicial Code, Section 240(a)	2
Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App.:	
Section 3	10
Section 5	9, 10
Section 7 (c, d)	10

State Statutes	
California Statutes:	
Section 259 California Probate Code (Stats. 1941, c. 895)	2, 3, 6, 7, 11

Pages

Section 259.1, California Probate Code (Stats. 1941, c. 895) 2, 3, 11

Section 259.2, California Probate Code (Stats. 1941, c. 895) 2, 3, 11

Section 259, California Probate Code (Stats. 1945, c. 1160) 2, 11

Miscellaneous

Harvard Law Review, Note, 57: 730, 731 10

Letter from Acting Secretary of State Grew to the Attorney-General, May 31, 1945 10

Meares, Trading With the Enemy Act (Annotated) 1924, p. 34 8

The Axis in Defeat, Department of State Publication 2423, pp. 62, 72 8

In the Supreme Court,

OF THE

United States

OCTOBER TERM, 1946

No. 626

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the District Court (R. 29-40) is reported at 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 52-63) is reported at 156 F. 2d 653.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22, 1945. (R. 63-64.) A petition for amendment of the opinion was denied by an order entered on July 17, 1946. (R. 64.) On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until October 21, 1946. The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895) are invalid as an invasion of the federal province of control over foreign affairs.

2. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the war between the United States and Germany, and by the Trading With the Enemy Act.

3. Whether Section 259, California Probate Code, as amended (Stats. 1945, ch. 1160) is such a change of law as governs upon appeal.

TREATY AND STATUTES INVOLVED.

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. i-iv.

STATEMENT.

Pursuant to paragraph 4 of Rule 27, Revised Rules of the Supreme Court of the United States, respondents adopt the Statement contained in petitioner's Petition for Writ of Certiorari (Petition pp. 3-6), with the exception of the closing sentence thereof (Petition p. 6). This last sentence of the Statement refers to the opinion of the Circuit Court of Appeals for the Ninth Circuit (*Allen v. Markham,* 156 F 2d 653, 663; R. 62-63) and characterizes the opinion as holding "that the amended statute imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 62-63)." (Petition p. 6.)

Respondents' statement characterizes this opinion as holding that the amended statute does not apply upon appeal, that this case must be governed by the law as of the date of the decedent's death, e.g. Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895), that the rights and interests of all parties are determined by the law as of that date, and that, therefore, the burden of proof of the existence of reciprocal inheritance rights remains upon the Custodian. (R. 62-63.)

REASONS FOR DENYING THE WRIT.

The national importance of the issues involved in this case is not determinative of the question as to whether the writ should issue, if the decision below

is considered correct. Petitioner states that five other states, besides California, have similar reciprocal inheritance statutes (Petition p. 7, n. 2) and it is to be noted that these are largely within the same judicial circuit governed by the court which rendered the decision in issue. The decision of the Circuit Court of Appeals for the Ninth Circuit is binding upon all of those states which have invoked such statutes to defeat vesting orders. (Petition p. 7.) There is, then, no conflict of decision on the issues involved. The entire weight of petitioner's argument for the issuance of the writ must depend on the intrinsic worth of the decision of the lower court. This decision is correct.

---

1. **THE CALIFORNIA STATUTE IS NOT INVALID AS AN INVASION OF THE FEDERAL PROVINCE OF CONTROL OVER FOREIGN AFFAIRS.**

The state has power to regulate the right of inheritance and succession and testamentary disposition of property within the state.

Irving Trust Co. v. Day, 314 U.S. 556, 562.

The power of the state government to regulate rights of inheritance includes the power to deny all aliens any right to inherit. *Terrace v. Thompson*, 263 U.S. 197. This is conceded by petitioner. (Petition p. 9.)

If the state has the power to deny absolutely, it must, then, have the power to grant or deny conditionally. The only questions raised by petitioner are

whether the condition of reciprocity exacted by the California legislature (1) invades the treaty-making power of the federal government (Petition p. 8) and (2) is related to any legitimate benefit to California connected with the exercise of power over succession to property. (Petition p. 9.)

The latter question is simply answered: the requirement of reciprocity is but an application of the principles of comity, a doctrine familiar in conflicts of laws, to legislative control of rights of inheritance. The condition exacted, that of reciprocity of rights of inheritance, is directly and obviously related to a legitimate field of concern to the California legislature —namely, the rights of its citizens to receive their inheritance from foreign countries.

Petitioner contends, in respect to the first question, that the California statute is invalid as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights, and is, therefore, an unconstitutional invasion of the federal treaty-making power. (Petition p. 8.) The argument, in effect, is that a state statute not in conflict with the terms of a federal treaty, but which in fact depends for its effect and operation upon federal treaties, and merely seeks to implement and supplement such treaties, is nevertheless void. The California statute merely executes the provisions of such treaties as remain in force and contain provisions similar to Article IV of the Treaty of 1923 with Germany. (Appendix p. i.)

The California statute by its reciprocal provisions recognizes the treaty making power of the Federal Government. By its very terms this statute recognizes the supremacy of the treaty making power and the statute depends for its very operation upon the exercise of that power by the Federal Government. The statute is designed solely to execute within a field of state power the purposes of treaties executed by the Federal Government. Where no treaty is in effect the states have power over rights of succession, whether by will or intestacy, by aliens.

Particularly in point on this issue is the recent California case of *In re Knutzen's Estate,* 70 ACA 856, 161 P 2d 598 (1945). In this case, also involving the Treaty of 1923, the California Probate Court ordered distribution of the entire estate to the local heir, under Section 259, Probate Code, cutting off three German heirs-at-law. The Custodian contended that the statute was unconstitutional as an invasion of the treaty-making power. The Appellate Court, proceeding under the assumption that the Treaty was still in effect and not abrogated, held that the first paragraph of Article IV of the Treaty (Appendix p. i) does not purport, in terms, to supplant states laws governing the laws of succession, but that the language of the paragraph recognizes that local law can disqualify aliens from *taking* or *holding* realty. It was further noted that Articles I, XII, XIII and XXIV of this Treaty, governing the rights of consuls to administer estates of aliens, contained such qualifying phrases as "so far as the laws of the country per-

mit", and "provided the laws of the place where the estate is administered so permit". The court considered that the presence of such qualifying phrases throughout the Treaty clearly demonstrated that local state laws must be given effect. Accord: *Estate of Bevilacqua,* 70 ACA 679, 161 P 2d 589 (1945).

The California statute does not in any sense purport to negotiate with foreign states, nor does it tend to induce any foreign state to enter into any binding pact. Section 259, California Probate Code (Stats. 1941, ch. 895) gives equal effect to treaties and foreign law which existed prior to its enactment as it does to treaties and foreign law concluded and enacted since, whether the latter were intended and designed to comply with the statute or not. The effect of the California statute bears no more resemblance to treaty-making than does the Federal Estate Tax Law in giving credit for state inheritance taxes paid. (26 U.S. C.A. Sec. 813 (b).) If the latter Federal statute induces the several states to enact similar laws, it is only the exercise of a rightful, inherent power, and certainly cannot be characterized as the creation of treaties between the Federal and State Governments where none is authorized.

Clearly, then, the State of California has the power to legislate on the subject of rights of inheritance, and it may so condition this right as provided in this statute.

2. ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY WAS ABROGATED BY THE WAR BETWEEN THE UNITED STATES AND GERMANY, AND BY THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT.

There is an inconsistency between a state of war, especially war as it is waged in our times, and the continued guarantee of rights of inheritance to the citizens and nationals of an enemy country. This is particularly true of the recent conflict between this country and Germany, a conflict in which the avowed purpose of both the belligerents was the complete destruction of the other; and which conflict did result in the obliteration of any central government in Germany, so that one of the parties to the Treaty in issue has entirely ceased to exist and no longer remains capable of performing its terms.

See:

Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Dept. of State Publication 2423, pp. 62, 72 (Appendix p. iv).

The opinion of Judge Cardozo in *Techt v. Hughes*, 229 N.Y. 222, cert. den. 254 U.S. 643, upon which petitioner places great reliance (Petition p. 10) is readily distinguishable from the instant case in that the decision involved the rights of an enemy alien *resident* in this country. See: Meares, Trading With the Enemy Act, Annotated (1924) at p. 34. Further, there had been no hiatus in the existence of a central government in Austria following the war's end.

In addition to the nature of the conflict, and the resultant collapse of the German State, the terms and spirit of the Trading With the Enemy Act (50 U.S. C.A. Appendix) are entirely irreconcilable with Article IV of the Treaty of 1923. The court below (R. 62) adverted to this conflict and concluded, correctly, that "To award the decedent's property to the Alien Property Custodian would be to give him a right in direct contradiction to the right of aliens under the Treaty which he contends is in full effect."

The Treaty purports to provide that Germans shall be able to take real and personal property from the United States, if certain local conditions are met; while the Trading With the Enemy Act is a flat inhibition upon such rights. In such cases where a later, Federal statute conflicts with a treaty provision, the latter has been held to fail.

Chinese Exclusion Case, 130 U.S. 581 (1888);
Whitney v. Robertson, 124 U.S. 190 (1888).

Petitioner states (Petition p. 14) that Section 5(b) of the Trading With the Enemy Act merely confers authority to vest property, and, further, that not until this authority is actually exercised does the statute conflict with the Treaty. It is, however, from the *promulgation* of a power contradictory to the Treaty, rather than the actual *exercise* of such power, that the governing principle must be derived. The Statute, besides permitting the vesting of such property, forbade German nationals from removing property or money from the United States, to have any communi-

cation of a business nature with persons in this country, and prohibiting the bringing of German nationals into the United States or to transmit communications to them. (Trading With the Enemy Act, Sec. 7 (c, d) 5 and 3.) The very spirit of the statute is contrary to the Treaty.

Note, 57 *Harvard Law Review,* 730 at 731 (1944).

The basic principle to govern this case is unaffected by the possibility that Congress *may,* in the future, forward some, or even most of the property to the foreign claimants. Should this occur, it would not be any confirmation of a right, but as a matter of grace to the vanquished.

See:

United States v. White Dental Co., 274 U.S. 398 at pp. 402, 403.

The Letter from Acting Secretary of State Grew to the Attorney-General (Petition, Appendix, pp. 24-31) cannot be accorded a great deal of weight. It is, at most, a review of judicial opinions by a layman, and fails to advert to the inconsistency between the Trading With the Enemy Act and the continued existence of Article IV of the Treaty, nor does it mention the important political problem raised by the collapse of the German State.

3. SECTION 259, CALIFORNIA PROBATE CODE, AS AMENDED (STATS. 1945, c. 1160) WAS NOT GOVERNING UPON THIS APPEAL.

Petitioner states (Petition p. 19) that the court below applied the amended California statute to the case, but still held that the burden of proof on the issue of reciprocity was on the Custodian. (Petition p. 20.) Petitioner is laboring under a misconception of the opinion below. The court below, first, discusses the constitutionality of Sections 259, 259.1 and 259.2, California Probate Code (R. 57-58), not the constitutionality of Section 259 alone, which would have been the case if the amended statute had been considered applicable, since the 1945 amended statute had been considered applicable, since the 1945 amendment repealed Sections 259.1 and 259.2. Further, it is quite clear that the court below considered the amended statute inapplicable to the appeal. The court states that the law as of the date of decedent's death must govern. (R. 63.)

Under the established law of California, inheritance rights are determined by the law in effect at the date of the decedent's death. Subsequent laws or conditions are immaterial.

Brenham v. Story, 39 Cal. 179;
Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349.

In any event, the case below was submitted upon an agreed statement of facts by which, as a matter of pleading, the Alien Property Custodian is now bound. (R. 30.)

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, Richmond, California,
November 15, 1946.

JOSEPH WAHRHAFTIG,
Attorney for Respondents.
ROBERT W. KENNY,
Attorney General of the State of California,
EVERETT W. MATTOON,
Deputy Attorney General of the State of California,
Amici Curiae.

S. C. MASTERSON,
MATT WAHRHAFTIG,
JOSEPH GENSER,
Of Counsel.

(Appendix Follows.)

Appendix

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose

of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

California Probate Code, Sections 259, 259.1, 259.2, Stats. 1941, c. 895.

259. *Right of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or is territories money originating from the estate of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territorites to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee, or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such

petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U.S.C. App., Supp. V, 5 (b), provides in pertinent part as follows:

(1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

"There is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers."

Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Department of State Publication 2423, p. 62.

"5. The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings, or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nation without the sanction of the Allied Representatives.

"6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party."

Agreement between Governments of the United Kingdom, United States of America, and USSR, and the Provisional Government of the French Republic, made in Berlin, Sept. 20, 1945. *The Axis in Defeat,* State Department Publication 2423, p. 72.

FILE COPY

FILED
APR 7 1947
CHARLES ELMORE CROPLEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, *Attorney General, as Successor to the Alien Property Custodian,*
Petitioner,

vs.

ANTONA ALLEN, GERTRUDE DIXWHDDIE, HILDA PIGOZZI, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

JOSEPH WAHRHAFTIG,
S. C. MASTERSON,
413 Tenth Street, Richmond, California,
Attorneys for Respondents.

MATT WAHRHAFTIG,
Bank of America Building, Oakland, California,
JOSEPH GENSER,
413 Tenth Street, Richmond, California,
Of Counsel.

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Treaties and statutes involved	3
Statement	3
Summary of argument	4
Argument	6
I. Article IV of the Treaty of 1923 with Germany is not controlling in this case, and the Custodian cannot rely upon it to sustain title to the estate involved	6
A. Article IV ceased to be operative during the present war	6
1. The effect of the war upon the Treaty of 1923	7
2. The effect of the Trading With the Enemy Act	30
3. The effect of the collapse of the German State and the cessation of its existence as an international personality	44
B. Article IV does not govern succession by German nationals to personalty of decedent Americans	50
II. The California statute is valid, apart from the Treaty and does not invade the federal field of control over foreign relations	54
III. The Custodian has the burden of proof in this case	69
Conclusion	74
Appendix A	i
Appendix B	vi
Appendix C	x

Table of Authorities Cited

Cases

	Pages
A. Couthoui, Inc. v. United States, 54 F. (2d) 158, cert. den. 285 U. S. 548	62
Allen v. Markham, 156 F. (2d) 653, R. pp. 29-40	3
Ankeny v. Clark, 148 U. S. 345 (1892)	72
Arndt-Ober v. Metropolitan Opera Co., 169 N.Y.S. 944	15
Barnaby v. Barnaby, 100 Cal. App. 195, 279 P. 1064 (1929)	72
Bertocco v. Banecl et Scholtus, Ann. Dig. 1935-37 Case No. 201	55
Blythe v. Hinckley, 180 U. S. 333 (1900)	57, 59
Carey v. South Dakota, 250 U. S. 118	62
Chas. C. Steward Mach. Co. v. Davis, 301 U. S. 548	62, 68
Charlton v. Kelly, 229 U. S. 447	49
Chew Heong v. United States, 112 U. S. 536	39, 40
Chinese Exclusion Case, 130 U. S. 581 (1888)	37
Chy Lung v. Freeman, 92 U. S. 275	55, 64
Cook v. United States, 288 U. S. 102	39
Cummings v. Deutsche Bank, 300 U. S. 115 (1936)	27, 36, 37
Demorest v. City Bank Co., 321 U. S. 36	56
Dickson v. Uhlmann Grain Co., 288 U. S. 188	62
Duke of Richmond v. Milne's Executors, 17 La. 312, 36 Am. Dec. 613 (1841)	58
Dunn v. Brown, 245 U. S. 176 (1917)	53
Edwards v. California, 314 U. S. 160 (1941)	64
Estate of McCarthy, 127 Cal. App. 80, 15 P. (2d) 223	60
Ex parte Sparks, 120 Cal. 395, 52 P. 715 (1898)	72
Florida v. Mellon, 273 U. S. 12	62
Fong Yue Ting v. United States, 149 U. S. 698 (1892)	37
Frederickson v. Louisiana, 23 How. 445	52
George E. Warren Corp. v. United States (CCA 2, 1938), 94 F. (2d) 597	37
Gilbert v. Minnesota, 254 U. S. 325	62
Goos v. Brooks, 117 Neb. 750, 223 N. W. 13	12
Griswold v. Waddington, 16 Johns. (N.Y.) 438 (1819)	8

Pages

Haley v. Sheridan, 94 N.Y.S. 864 (1905) 58
Halter v. Nebraska, 205 U. S. 34 62
Henderson v. Mayor of New York, 92 U. S. 259 ..... 55, 64
Hijo v. United States, 194 U. S. 315, 324 (1903) 37
Helvering v. Davis, 301 U. S. 619 62
Hines v. Davidowitz, 312 U. S. 52 ..... 60, 64, 66, 67
Hirabayashi v. United States, 320 U. S. 81 12

In re Bevilacqua's Estate (Cal. App. (2d)), 161 P. (2d) 589 (1945) 66
In re Clinton Bridge, 1 Wool. 150 (Cir. Ct. D. Ia., 1867), Fed. Cas. No. 2,900 37
In re Kollock, 165 U. S. 526, 536 (1896) 61
In re Nossen's Estate (Mont.), 162 P. (2d) 216 (1945) 34
In re Strobel's Estate, 39 N.Y.S. 169 49
Irving Trust Co. v. Day, 314 U. S. 556, 562 (1941) 56, 59

Kahn v. Garvin (S.D. N.Y., 1920), 263 F. 909 34
Karnuth v. United States, 279 U. S. 231 ..... 28, 41
Kelly v. Washington, 302 U. S. 1, 10 (1937) 15, 62, 63
Korematsu v. United States, 323 U. S. 214 15
Krause v. Rarity, 285 P. 879 (1930) 72

Lowery v. Hallett, 105 Cal. App. 84, 287 P. 110 72
Lyeth v. Hoey, 305 U. S. 188 56

Mager v. Grima, 49 U. S. 490 ..... 55, 56, 60
Maurer v. Hamilton, 309 U. S. 598, 614 62
Maxwell v. Bugbee, 250 U. S. 525 56
Mayer v. Garvan, 278 F. 27 (CCA 1, 1922) 8
McCray v. United States, 195 U. S. 27 62
Miller v. Rouse (S.D. N.Y., 1921), 276 F. 715 33
Mintz v. Baldwin, 289 U. S. 346 62
Missouri v. Holland, 252 U. S. 416 62
Moody v. Hagen, 36 N. D. 471 (1917), aff'd sub. nom. Skarderud v. Tax Commission, 245 U. S. 633 (1917) 53
Morris v. Board of Education, 119 Cal. App. 750, 7 P. (2d) 364 72

Nigro v. United States, 276 U. S. 332 62
Northern Securities Co. v. United States, 193 U. S. 197 63

Pages

People v. Compagnie General Transatlantique, 107 U. S. 59 ..... 55, 64
Peterson v. Iowa, 245 U. S. 170 (1917) 53

Rainey v. United States, 232 U. S. 310 (1913) 37, 38
Reid v. Colorado, 187 U. S. 137 62
Ropes v. Clinch, 8 Blatch. 304 (Cir. Ct. S.D. N.Y. 1871), Fed. Cas. No. 12,041 ..... 36, 37
Ross v. Jones, 22 Wall. 576 (1874) 8

Savage v. Jones, 225 U. S. 501 ..... 8, 62
Second Russian Ins. Co. v. Miller, 297 F. 404, aff'd 268 U. S. 552 8
Sinnot v. Davenport, 22 How. (63 U.S.) 227, 243 (1859) .. 63
Societá Walter Kidde v. Societá Deutsche Werft, Annual Digest, 1929-1930, Case No. 281 26
Society for the Propagation of the Gospel v. New Haven, 8 Wheat. (21 U. S.) 464 ..... 8, 21
Sonzinsky v. United States, 300 U. S. 506 62
State v. Darwin, 102 Wash. 402, 173 P. 29 15
State ex rel. Miner v. Reardon, 120 Kan. 614, 245 P. 158 .. 42

Taylor v. Morton, 2 Curtis, 454 (Cir. Ct. D. Mass. 1855), Fed. Cas. No. 13,799 ..... 37, 38
Techt v. Hughes, 229 N. Y. 222 (1920), cert. den. 254 U. S. 643, 11 A. L. R. 166 ..... 11, 12, 15, 18, 20, 28, 29, 41, 58
Terlinden v. Ames, 184 U. S. 270 (1901) 49, 50
Terrace v. Thompson, 263 U. S. 197 56
The Cherokee Tobacco, 78 U. S. (11 Wall.) 616 (1870) 37, 39
The Head Money Cases, 112 U. S. 580, 599 ..... 21, 37
The Rapid, Fed. Cas. No. 11,576 (1812), aff'd 8 Cranch. 155 8, 11
The Schooner Peggy, 1 Cranch. 103 50
The Sophie Rickmers, 45 F. (2d) 413 ..... 28, 46
The William Bagley, 5 Wall. 377 (1866) 8
Tortoriello v. Seghorn, 103 Atl. 393 (N. J. Eq.) 15

United States v. Belmont, 301 U. S. 324 67
United States v. Curtiss-Wright Corp., 299 U. S. 304 59
United States v. Doremus, 249 U. S. 86 62
United States v. Grossmayer, 9 Wall. 72 (1869) 8

Pages

United States v. Payne, 264 U. S. 446 40
United States v. Pink, 315 U. S. 203 67
United States v. Securities Corporation General (Ct. App. D.C. 1925), 4 F. (2d) 619 36
United States v. White Dental Co., 276 U. S. 398 at pp. 402, 403 37

Valk v. United States, 29 Ct. Cl. 62, aff'd 168 U. S. 703 21
Vanderbilt v. All Persons, 163 Cal. 507, 126 P. 158 (1912) ... 7
Veazie Bank v. Fenno, 8 Wall. 533 62

Whitney v. Robertson, 124 U. S. 190 (1888) 37

Statutes

3 Ariz. Code Annot. (1939), Sec. 39-111 58

Calif. Code of Civ. Proc., Sec. 1855a 72
Calif. Prob. Code, Sec. 27 56
Calif. Prob. Code, Sec. 201 60
Calif. Prob. Code, Sec. 259 (Ch. 1160, Stats. 1945) 69
Calif. Prob. Code, Secs. 259, 259.1, 259.2 (Ch. 895, Calif. Stats. 1941) 2, 3, 69, 71
Calif. Prob. Code, Sec. 1026 56
Calif. State Legislature, Senate Bill 115 69
Conn., Sec. 5055, 2 Gen. Stats. (1930 Rev.) 58

Louisiana, Acts of, Sec. 7, Art. 315, 1855, p. 398 52
Louisiana Civil Code, 1825, Art. 1490 52

Montana, Laws of, Sec. 2, Ch. 104 (1939) 35, 58

2 Nev. Comp. Laws, Supp. 1931-1941, Secs. 9894, 9894.01, 9894.02 58
New York Laws, 1893, Ch. 207, p. 365 58
New York Laws, 1897, Ch. 593, p. 706 58
New York Laws, 1913, Ch. 152, 153 58
New York Real Property Law, Sec. 10 13

Okla. Stats. Ann. Perm. Ed., Title 50, Sec. 121 58
Okla. Stats. 1941, Title 84, Sec. 229 58

Pages

5 Ore. Comp. Laws, Annot. (1940), Sec. 61-107 58

Texas, 1 Vernon's Ann. Rev. Civ. Stats. of 1935, Arts. 167, 177 58
Trading with the Enemy Act (50 U.S.C. App.; 40 Stat. 411, as amended, 55 Stat. 838) 6, 13, 14, 17, 19, 29, 30, 31, 41, 44

U. S. Act, Mar. 2, 1907, c. 2534, Sec. 3, 34 Stat. 1228 13
30 U.S.C.A., Sec. 181, 41 Stat. 437 67
U. S. Tariff Act of 1922 39
U. S. Tariff Act of 1930 40

Treaties

Bulgaria-Turkey, 1913 (Brit. and For. State Pap., CVII, Pt. 1, 709) 24

Chile-Peru, 1883 (Brit. and For. State Pap., LXXIV, 351) 23

Germany-Russia, 1894, 1904 (V. Hackworth, Digest of Int. L. 379) 26

Hague Treaty, 1905 (V. Hackworth, Digest of Int. L. p. 299) 55

Italy-Germany, 1892 (V. Hackworth, Digest of Int. L. 381) 26
Italy-Turkey, 1912 (Nouv. Rec. Gen., 3 ser. VII, p. 8) 24

Japan-China, 1895 (Nouv. Rec. Gen., 2 ser. XXI, 644) 23
Japan-Russia, 1905 (For. Rel., 1905, p. 826) 24

Spain-Chile, 1883 (Brit. and For. State Pap. LXXIV, 721) .. 23

Treaty of Berlin, 1921 (42 Stat. 1939) 27, 42
Treaty of Constantinople, 1879 (Nouv. Rec. Gen. 2 ser. III 470) 23
Treaty of Frankfort, 1871 (Nouv. Rec. Gen., XIX, 693) 23
Treaty of Frankfort, 1871 (Nouv. Rec. Gen., XX, 862) 23
Treaty of Paris, 1856 (Nouv. Rec. Gen., XV, 780; Brit. and For. State Pap., XLVI, 17) 22
Treaty of Prague, 1866 (Nouv. Rec. Gen., XVIII, 348) ... 23
Treaty of Versailles, 1919 (Carnegie End. for Intl. Peace, p. 168) 25, 26, 27, 41

Pages

Treaty of Vienna, 1864 (Nouv. Rec. Gen., XVII, Part 2, p. 475) 23
Turkey-Greece, 1913 (Brit. and For. State Pap., CVII, Pt. 1, 894) 24

U. S.-Austria Hungary, 1848 (9 Stat. 944) 13
U. S.-Bavaria, 1845 (9 Stat. 326) 20
U. S.-Denmark, 1826 (8 Stat. 340) 53
U. S.-France, 1853 (10 Stat. 992) 66
U. S.-Germany, 1923 (44 Stat. 2132) 2, 4, 6, 7, 13
U. S.-Great Britain, 1924 (43 Stat. 174) 39
U. S.-Netherlands, 1782 (8 Stat. 32) 47
U. S.-Norway, 1827 (8 Stat. 346) 53
U. S.-Prussia, 1799 (8 Stat. 162, 174) 7
U. S.-Prussia, 1828 (8 Stat. 378) 20, 27, 28, 42
U. S.-Siam, 1937 (53 Stat. 1731) 67
U. S.-Sweden, 1783 (8 Stat. 346) 53
U. S.-Wurttemberg, 1844 (8 Stat. 588) 52

Treatises and Miscellaneous

11 A.L.R., 180 21
Am. J., VII, Supp. p. 59 24
Am. J., VIII, Supp. p. 31 24
Am. J., VIII, Supp. p. 46 25
Annual Digest:
Case No. 331, 1925-1926 26
Case No. 281, 1929-1930 21
Case No. 201, 1935-1937 55

Baty and Morgan, War: Its Conduct and Legal Results (1915) 399 7
Bluntschli, Droit International Codifie, Sec. 538 9
Brit. and For. State Pap.:
LXXIV, p. 351 23
CVII, Part 1, p. 709 24
CVII, Part 1, p. 894 25

Chitty, Legal Effect of War on Commerce, pp. 1-2 21

Pages

Davis, Treaty Notes, Treaty Vol. (1776-1887), p. 1235 48

"Enemy Property", 11 Law and Contemp. Problems, No. 1 (1945) 18, 37

Fenwick, Int. Law. (1934) p. 121 47
Fiore, Int. Law Codified (Borchard's Trans. 5th Italian ed. 1918), Sec. 859 9
For. Rel. 1905, p. 826 24
For. Rel., 1918 Supp. 2:
pp. 256, 267, 271, 292 11
pp. 267, 292, 309 ..... 18, 20
Franklin D. Roosevelt, The War Message, p. 26 17

Glenn, Int. Law, p. 152 21

Hackworth, VI Digest of Int. Law (1943) p. 327 20
Hackworth, V Digest of Int. Law (1943):
p. 299 41
p. 379 26
p. 381 26
Hall, Int. Law, 398, 401 9
Hall, Int. Law, 125 21
Halleck, Int. Law, Sec. 35, Ch. 18 47
Halleck, Int. Law and Laws of War, pp. 371, 398 21
40 Harvard Law Review, 752, fn. 29 42
Hohfeld, Wesley N. Fundamental Legal Conceptions 32
Hyde, 2, Int. Law (1922 ed.), pp. 91-98 ..... 21, 22
Hyde, Int. Law (1922), Sec. 543 ..... 47, 49

15 Illinois L. Rev. 459 ..... 18, 21
International Commission of Jurists, Rio de Janeiro, 1927, Project IV 46

Lenoir, The Effect of War on Bilateral Treaties (1946), 34 Geo. L. M. 129 7
Letter, Attorney-General Earl Warren to Hon. Harry B. Riley, State Controller, July 15, 1942 43
Letter, Department of State to Solicitor-General, May 21, 1945 42

Pages

Letter, Secretary of State Bayard to Messrs. L. & E. Lehman, 156 Ms. Dom. Let. 80 20

McNair, Law of Treaties (1938):
p. 389 47
pp. 548-551 26
Meares, Trading with The Enemy Act, Annot. 1924, p. 34 15
28 Mich. L. Rev. 318 43
Moore, V, Digest of Int. Law:
pp. 344-5 48
p. 349 49
Moore, "Effects of War on Commercial Intercourse", in Meares, Trading with The Enemy Act Annot. (1924), pp. 445-470 11
Moore, 5 Int. Law pp. 372-387 21

Nouv. Rec. Gen.:
XV, p. 780 22
XVII, part 2, p. 475 23
XVIII, p. 348 23
XIX, p. 693 23
XX, p. 863 23
2 ser. III, p. 470 23
2 ser. XXI, p. 644 23
3 ser. VII, p. 8 24

38 Op. Atty. Gen. U. S. 476 67
Oppenheim, Int. Law, V. 2, Sec. 99 ..... 9, 21

3 Phillimore, Commentaries upon International Law (2d ed. 1873), p. 794 ..... 7, 21
Phillipson, Termination of War and Treaties of Peace:
p. 260 23
p. 357 22
p. 370 23
p. 387 23
p. 391 23
p. 404 23
p. 412 23
p. 415 23

Pages

p. 427 24
p. 431 24
p. 443 24
p. 450 25

Radin, Max, The Law and Mr. Smith 32
Revue Critique de droit international (1937), vol. 32, pp. 95, 96, 97 55
21 Rivista di diritto internzionale (1929) 418-420 26
Statement by APC (Palmer) For. Rel. 1918 Supp. 2:
page 271 14
page 256 15
page 267 15
page 292 15
Sutherland, Statutory Construction, vol. 2 (2d ed.), Sec. 674 73

The Axis in Defeat, Dept. of State Publ. 2423, pp. 62, 72 ..... 16, 45
Treaties of Peace (1919-1923), Carnegie End. for Int. Peace, p. 168 ..... 25, 41
Twiss, The Law of Nations (2d ed. 1875) p. 264 ..... 7, 21

Vattel, 3, The Law of Nations (trans. ed. 1758, Fenwick 1916), Sec. 175 7
Vattel, Law of Nations, Chitty's Ed., 371 21

Wheaton, Elements of Int. Law, Sec. 275 47
Wilson, Handbook of Int. Law (1939), p. 221 47
Wilson, International Law, Sec. 85 21
Woodrow Wilson, For a Declaration of War against Germany, I War and Peace (1927), p. 11 16

38 Yale Law Journal 1150 41

Zeitschrift fur internationales Recht (1926), p. 408 (XXXVI) 26

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 626

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,
Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 15-21) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 29-40) is reported in 156 F. (2d) 653.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 22, 1946. (R. 41.) A petition for amendment of the opinion was denied by an order entered on July 17, 1946. (R. 41.) On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was granted on December 9, 1946. (R. 42.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Article IV of the Treaty was abrogated or suspended by the declaration of war with Germany and the subsequent collapse of the German state, or otherwise rendered inoperative from the time of the declaration of war, by the provisions of the Trading with the Enemy Act, as amended.

2. Whether Article IV of the Treaty of 1923 with Germany is in conflict with the California statute and hence overrides the statute.

3. Whether Sections 259, 259.1 and 259.2 of the California Probate Code are invalid as an invasion of the Federal field of control over foreign affairs.

4. Whether the amendment of the California statute in 1945, pending this appeal, governs upon appeal.

TREATY AND STATUTES INVOLVED.

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. 56-60.

STATEMENT.

Pursuant to paragraph 4 of Rule 27, Revised Rules of the Supreme Court of the United States, respondents adopt the Statement contained in petitioner's brief (Brief for Petitioner pp. 3-6), with the exception of the closing sentence thereof. (Brief for Petitioner p. 6.) This last sentence of the Statement refers to the opinion of the Circuit Court of Appeals for the Ninth Circuit (*Allen v. Markham*, 156 F. (2d) 653, 663; R. 29-40) and characterizes the opinion as holding that the California reciprocal inheritance statute "as it was amended imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian. (R. pp. 39-40.)" (Brief for Petitioner p. 6.)

Respondents' statement characterizes the opinion of the Court below as holding that the amended statute does not apply upon appeal, that this case must be governed by the law as of the date of the decedent's death, e.g., Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895), that the rights and interests of all parties are determined by the law as of that date, and that, therefore, the burden of proof of the existence of reciprocal inheritance rights remains upon the Custodian. (R. p. 40.)

SUMMARY OF ARGUMENT.

I.

Article IV of the Treaty of 1923 with Germany was abrogated, or at least suspended, by the declaration of war. The existence and continued operation of a Treaty of Friendship and Commerce is incompatible with a state of belligerency under modern conditions of war. It is particularly incongruous to hold that such a treaty survives a declaration of war in order to benefit enemy aliens actually resident in the enemy country. In addition, as a matter of real fact, the treaty cannot survive the complete collapse of the German state, which creates a condition under which mutuality of consent and performance by the parties thereto becomes impossible. The Trading with the Enemy Act, as amended, is, further, a federal statute, later in time, and in terms irreconcilable with Article IV of the treaty which must be held to fall thereby.

II.

Article IV of the Treaty of 1923 with Germany does not override the California statute because there is no conflict between the two. Implicit in the operation of the statute is recognition of the existence of the treaty making power of the Federal Government—if the treaty is in effect, the statute implements and executes its terms; if the treaty no longer exists, then the statute predicates a valid state policy, and denies rights of inheritance to aliens not protected by any treaty. In any event, paragraph two of Article IV of the Treaty does not provide for reciprocity of in-

heritance rights as to estates of personalty left by American nationals.

III.

The California statute is not invalid as an invasion of the federal field of control over foreign affairs, simply because the statute does not reach into such field. The statute merely regulates a field which in both theory and practice has always been within exclusively state jurisdiction, namely rights of inheritance. That the statute may determine rights of peoples living in foreign countries is merely an incidental effect of an otherwise valid exercise of state power.

IV.

The amendment of the California statute in 1945, after decision in the District Court but pending appeal to the Circuit Court of Appeals, does not apply to, nor govern this appeal. The change in law was merely one of procedure, affecting a stage in the case already completed. Changes in procedure after trial and pending appeal do not control on appeal.

ARGUMENT.

I. ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY IS NOT CONTROLLING IN THIS CASE, AND THE CUSTODIAN CANNOT RELY UPON IT TO SUSTAIN TITLE TO THE ESTATE INVOLVED.

A. ARTICLE IV CEASED TO BE OPERATIVE DURING THE PRESENT WAR.

The question of the continued existence of Article IV of the Treaty of 1923 with Germany (see Appendix A, p. i) is one of paramount importance in this case. The Custodian must establish the present effectiveness of this article of the treaty as the fundamental basis of his claim to the estate herein involved. Respondents contend that this treaty is no longer a continuing force, and has not been such for the life of this action; this contention is based on the following three reasons, any one of which alone, is sufficient to support the decision of the Court below: (1) the war with Germany served to abrogate or suspend this treaty; (2) the Trading with the Enemy Act (50 U.S.C. App., 40 Stat. 411 as amended) is a Federal statute, later in date than the treaty, and is so inconsistent with the expressed purpose of the Treaty that it must be held to have abrogated the Treaty; and (3) the complete collapse of Germany, and its loss of international personality as a result of the war has nullified the Treaty. While these three bases are treated separately herein, there is a cumulative effect of all three upon the problem which cannot be disregarded, and which serves, largely, as a factor to distinguish the issue before this court from that in any other case which has come before it, or which has heretofore been decided. In no other case has any

court had to decide the effect of all three of these factors.

1. The effect of the war upon the Tretay of 1923.

There is little agreement among the text writers as to the general effect of war upon treaties as a whole. The views expressed range from the one extreme, that war terminates all treaties,[1] to the other, that war terminates none, with intermediate views involving distinctions between termination and suspension of treaties, and opinions made dependent upon the type of treaty involved and the intent of the parties thereto as to the effect of war.

See:

Lenoir, *The Effect of War on Bilateral Treaties* (1946) 34 Geo. L.J. 129.

There is, however, substantial agreement that certain types of treaties do survive the outbreak of war between the contracting parties. Those treaties, for example, which are concluded with the view of regulating the conduct of the parties, or their nationals, during the hostilities, clearly remain in force during a war, and indeed might be said to come into force only during such war.[2] Similarly, treaties which con-

[1] "Conventions and treaties are broken or annulled when war breaks out between the contracting parties, either because such agreements imply a state of peace, or because each party having the right to deprive the enemy of his property, may take from him such rights as have been given him by treaties." 3 Vattel, *The Law of Nations* (Trans. ed. 1758, Fenwick 1916) Sect. 175. Accord: Baty and Morgan, *War: Its Conduct and Legal Results* (1915) 399; 3 Phillimore, *Commentaries upon International Law* (2d ed. 1873) p. 794; Twiss, *The Law of Nations* (2d ed. 1875) p. 264.

[2] See: Article XXIV, Treaty of 1799 between United States and Prussia (8 Stat. 162, 174).

template a permanent arrangement, such as the establishment of a boundary, or which are otherwise entirely executed, so that nothing remains to be done, and all rights have become vested, cannot be changed by the outbreak of war alone.

Society for the Propagation of the Gospel v. New Haven, 8 Wheat. (21 U.S.) 464.

The Treaty in issue here is of the type known as a commercial treaty, and falls within neither of the two above types which are thought to survive the outbreak of war. It is as to this type of treaty that the major diversity of opinion exists in respect to the effect of war.

As a general, fundamental rule, the law, as expressed by the courts of this country, refuses to admit of any commercial intercourse or the existence of any civil, legal rights as between the nationals of the belligerents.

The Rapid, Fed. Cas. No. 11576 (1812) aff'd 8 Cranch. 155;

Ross v. Jones, 22 Wall. 576 (1874);

United States v. Grossmayer, 9 Wall. 72 (1869);

The William Bagaley, 5 Wall. 377 (1866);

Mdyer v. Garvan, 278 F. 27 (CCA 1, 1922);

Second Russion Ins. Co. v. Miller, 297 F. 404, aff'd 268 U.S. 552;

Griswold v. Waddington, 16 Johns. (N.Y.) 438 (1819).

As stated by Story, J., in *The Rapid, supra,* Fed. Cas. No. 11576, at p. 300:

"War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility with each other. All treaties, contracts, and rights of property are suspended. The subjects are in all respects considered as enemies. They may seize the persons and property of each other. They have no '*persona standi in judico*', no power to sue in the public courts of the enemy nation. It becomes in the highest degree criminal to comfort or aid the enemy; and if so, what more important aid can be afforded, than by succoring his necessities in trade, and warding off the blows aimed against his manufactures and commerce. It seem difficult, therefore, for a moment to sustain the opinion, that trade can subsist in a state of utter hostility. That contracts and credits can be valid, where they are liable to confiscation; and property may be passed, when it may be rightfully seized by the mere operations of war".

During the latter part of the last century, certain writers, the precursors of the so-called "modern" school of international law, gave currency to views which diverged from the above.[3] The basic reasons for this divergence can be ascribed only to the conditions of the era in which these authors lived, illustrative again, of the axiom that, in the study of the evolution of the law, "a page of history is worth a volume of logic". These basic reasons have been most aptly described by Dr. John Bassett Moore, Member

[3]Bluntschli, *Droit International Codifie*, Sect. 538; Fiore, *International Law Codified* (Borchard's Trans. 5th Italian ed. 1918) Sect. 859; Hall, *International Law*, 398, 401; 2 Oppenheim, *International Law*, Sect. 99.

of the Permanent Court of International Justice, as follows:

> "In the third quarter of the last century, certain writers on the continent of Europe, espousing the theory that war is 'a relation of state to state, and not of individual to individual', suggested the view that commerce between man and man was a 'natural right' the exercise of which not even war was to be regarded as suspending except so far as it might be expressly and specifically prohibited. * * * (These views) were no doubt influenced by the character of the armed conflicts of their own time, and particularly by that of the short, sharp, and decisive wars of Prussia with Denmark in 1864, with Austria in 1866, and with France in 1870. These contests, like those of France and Great Britain with Russia in 1854-1856, were distinctively military. The commercial and industrial resources of the nations concerned were scarcely involved. Such, it was believed, was to be the type of future international conflicts. They would be decided by what took place on the battlefield, and it would matter little what took place elsewhere.
>
> "Had Heffter, Bluntschli, and others of their school lived to witness the armed conflict through which the world has just passed, rivaling and even surpassing, in its drafts upon commerce and industry, as well as its direct attacks, by land, by sea, and by air, on unarmed civilians, the wars of the eighteenth century and the Napoleonic wars, they would have seen their theories discredited and have perceived the emptiness of the supposition that, while nations are engaged in

an armed struggle, their inhabitants may be commercially at peace."

Moore, *"Effects of War on Commercial Intercourse"*, in Meares, *Trading with The Enemy Act, Annotated* (1924) pp. 445-470.

It is impossible then, to pronounce a generalization which will reconcile all the decisions of the courts or the opinions of the writers. Any attempt to discover a thread of consistency among the authorities based on some intrinsic worth of the theories expressed is futile and illusory in the absence of any demonstration that the fundamental conditions of the era in which the pronouncement was made are approximated in the instant case. The law of treaties is essentially a pragmatic thing, and must be applied with a view to realism and the practical necessities of the moment of history in issue. As evidenced above, the rules espoused by the various authorities were the creatures of the needs of the times. The rule of *The Rapid, supra,* was the product of the harsh and uncompromising Napoleonic wars and the bitter conflicts surrounding the French Revolution; the new school of thought, led by Bluntschli, derived their philosophy from the type of war fought during the nineteenth century, the wars fought by relatively small, professional forces, and which were short and decisive, not engaging the entire resources of the belligerents.

With this in view, it is necessary to consider the decision in *Techt v. Hughes*, 229 N. Y. 222 (1920),

cert. den. 254 U.S. 643, Annotated 11 A.L.R. 166, upon which appellant herein places great reliance and emphasis (Brief for Petitioner, pp. 13-18). It is appellant's contention that the *Techt Case* has settled the law on this subject, and he cites two other state courts which have followed the *Techt Case*,

Goos v. Brocks, 117 Neb. 750;

State ex rel. Miner v. Reardon, 120 Kan. 614.

A careful analysis, then, of the surrounding circumstances, facts, reasoning, and actual decisions in the case of *Techt v. Hughes*, is required. The court in that case stated the facts of the case as follows:

> "James J. Hannigan, a citizen of the United States died intestate on December 27, 1917, seized in fee simple of real estate in the City of New York. Two daughters, the plaintiff, Sara E. Techt, and the defendant, Elizabeth L. Hughes, survived him. In November, 1911, the plaintiff became the wife of Frederick E. Techt, a resident of the United States, but a citizen of Austria-Hungary. On December 7, 1917, 20 days before the death of plaintiff's father, war was declared between Austria-Hungary and the United States. The record contains a concession that neither the plaintiff nor her husband has been interned, nor has the loyalty of either been questioned by the government of state or nation, and that both, remaining residents of the United States, have kept the peace and obeyed the laws. The plaintiff's capacity on December 27, 1917 to acquire title by descent is the question to be determined." (229 N.Y. at p. 226)

At the time in question, the law of the United States provided that any American woman who married a foreigner should take the nationality of her husband (Act, Mar. 2, 1907, c. 2534 Sec. 3, 34 stat. 1228), and the plaintiff was, therefore, legally an enemy alien at the time of her father's death. The law of New York provided that alien "friends" could inherit in the same manner as citizens (Sect. 10 Real Prop. Law); alien "enemies", therefore, had only such rights as the common law provided and could not take by descent. If the plaintiff were to take, then, it was necessary to establish her right on some other basis than the New York statute or the common law, in short, on the basis of the Treaty of 1848 between the United States and Austria-Hungary (9 Stat. 944), which contained a provision for reciprocal rights of inheritance similar to that of the Treaty of 1923 with Germany, in issue here.

In determining the question of the effect of war on treaties, Judge Cardozo adopted as the major premise for his decision:

> "That provisions compatible with a state of hostilities unless expressly terminated, will be enforced, and those incompatible rejected." (229 N.Y. at 241)

And the decision of the court was that inheritance by enemy aliens who were *resident* in the United States and loyal to this country was not incompatible with the state of war. Judge Cardozo adverted, in the opinion, as the basis for this holding, to the fact

that resident enemy aliens were free to buy and sell property, were to be undisturbed in the peaceful pursuits of their lives and occupations, and were to be accorded the consideration due all peaceful and law-abiding persons. (229 N.Y. 244, citing Trading with the Enemy Act, 40 Stat. 411, ch. 106, and the President's proclamation of December 11, 1917). The actual decision of the court was that to allow inheritance by a resident, loyal "enemy" alien in no way endangered the nation at war, and violated no policy of the federal government. In addition to the considerations referred to in the opinion itself, relating to the status of Austrian nationals resident in this country during the war, Judge Cardozo could not have been unmindful of the pronouncements by official governmental agencies during the war and bearing on the same issue:

> "The declaration of war with Austria-Hungary will not change the status of citizens or subjects of Austria-Hungary resident in this country. Such persons are not included within the term 'enemy' as employed in the Trading with the Enemy Act, and their property in this country will not be molested nor interfered with in any way * * *. There is no reason whatever why such persons should be concerned about their property, real or personal, or their funds in bank, or securities, or other investments. * * * Under the Trading with the Enemy Act the test of enemy character is one of residence and not nationality."
>
> Statement by Palmer, Alien Property Custodian, in *The Official Bulletin*, p. 2, No. 180,

Vol. 1, December 10, 1917 also found in For. Rel., (1918) Supp. 2, p. 271.[4]

In addition, there was sound judicial authority that enemy aliens if resident and peaceable were, during the first world war, to have broad and unfettered rights. Thus, in *Arndt-Ober v. Metropolitan Opera Co.*, 169 N.Y.S. 944, a resident, enemy alien was allowed standing in court to bring an action; in *State v. Darwin*, 102 Wash. 402, the court ordered the State Fish and Game Commissioner to issue a fishing license to a resident, enemy alien; and in *Tortoriello v. Seghorn*, 103 Atl. 393, the New Jersey chancellor decreed specific performance of a contract to convey land against resident, enemy aliens whose sole defense was their alleged war-time disability to convey. On the whole, the rationale of these cases of the first world war era was to prevent forfeiture and hardship against peaceable residents of this country. Cf. *Korematsu v. United States*, 323 U. S. 214; *Hirabayashi v. United States*, 320 U.S. 81.

See: Meares, *Trading with The Enemy Act, Annotated* (1924) p. 34.

Techt v. Hughes was, moreover, decided soon after the end of a war, which, although world-wide in effect and scope, differed radically in the stated objectives of this country from the one recently concluded. The clear and avowed objective of the United States in entering the recent war was the complete destruction

[4]See also For. Rel. 1918 Supp. 2, pp. 256, 267, 292.

of the German state, with no distinction made as to its government and people; the demand of the United States was unconditional surrender; and the result of the war was the accomplishment of that very objective—the German state has been destroyed, and its people are entirely dependent upon the victors for the very essence of their lives (see p. 45, infra, *Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers*). The war, the effect of which on the Treaty of 1848 with Austria was in issue, which conditioned the decision of Judge Cardozo had, for the United States, a more moderate objective:

> "We have no quarrel with the German people. We have no feeling toward them but one of sympathy and friendship. It was not upon their impulse that their government acted in entering this war. It was not with their previous knowledge or approval. It was a war determined upon as wars used to be determined upon in the old, unhappy days when peoples were nowhere consulted by their rulers and wars were provoked and waged in the interests of dynasties or of little groups of ambitious men who were accustomed to use their fellow men as pawns and tools." Woodrow Wilson on April 2, 1917, *For a Declaration of War against Germany*, I *War and Peace* (1927) p. 11.

The first World War, fought, in principle, against the enemy governments and not against their misguided and misled peoples, by its very nature was entirely alien from the objectives of World War II. This was a war to the death.

> "I repeat that the United States can accept no result save victory, final and complete. Not only must the shame of Japanese treachery be wiped out, but the sources of international brutality wherever they exist, must be absolutely and finally broken." Franklin D. Roosevelt, *The War Message*, p. 26, (Ritten House, 1942)

The essential difference between the war which conditioned Judge Cardozo and the war which is now in issue, is vividly illustrated by the changes in emphasis in the treatment of enemy property in the first war and in the present war. Section 5 of the Trading with the Eenemy Act (40 Stat. 415, as amended) provided, in pertinent part as follows:

> "During time of war or during any other period of national emergency declared by the President, the President may * * * investigate, regulate or prohibit * * * any transaction * * * in which any foreign state or a national or a political subdivision thereof * * * has any interest."

As originally enacted in the first World War, the function of the Trading with the Enemy Act was to prevent financial aid to the enemy governments, and to conserve the property of individual enemy aliens.

> "Broad purpose of Congress as expressed in Act is first to preserve enemy owned property in the United States from loss, and, second, to prevent every use of it which may be hostile or detrimental to the United States.
>
> "Subject of Germany or any of Germany's allies residing in this country, even though he had made no declaration of intention to become citizen, is

permitted to continue in trade and commerce and in possession and control of his property while he remains in the United States and obeys its laws. * * * There is of course no thought of confiscation or dissipation of property thus held in Trust." Telegram, Secretary of State Lansing to Minister in Netherlands, File, No. 763.72113/402a, For. Rel. 1918, Supp. 2, p. 267. See also: For. Rel. 1918, Supp. 2, p. 292.

By contrast, The First War Powers Act (55 Stat. 838) enacted in 1941, provided flatly for confiscation in the interests of the United States of all enemy property, whether government or individual property.

"* * * and any property or interest of any foreign country or national thereof shall vest * * * upon such terms and conditions as the President may prescribe such interest of property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." Sect. 5, Trading with the Enemy Act as amended by First War Powers Act of 1941. See; "Enemy Property", 11 Law and Contemp. Problems, No. 1 (1945).

The decision of the court in *Techt v. Hughes* then is quite clearly limited by the facts and the background under which the issue arose. The decision was undoubtedly based on the desire of preventing a grave hardship upon a very large number of American women who changed their nationality by marriage, but had continued to reside in and remain loyal to the United States.

See: Note, 15 Ill. Law Rev. 459.

The result of the case violated no national policy relative to the conduct of the war, since subjects of Austria had, throughout the war, been accorded favored treatment, if resident and peaceable.

It was mere dictum, however, for the court to state that even if the plaintiff were a non-resident and were living in Austria, that the policy of the country would be to assure her of title, which the Alien Property Custodian would vest. It would clearly be incorrect to hold that treaty provisions giving inheritance rights continued in effect during the war for the benefit of enemy aliens resident in hostile territory. There is a logical incompatibility between such a view, and the fact that Congress and the executive branch of the government had, by the Trading with the Enemy Act (40 Stat. 411), declared forfeit any such rights, constituting a repudiation, in advance, of any such holding. Further, if such were the law, it is remarkable that the Alien Property Custodian did not, during the era of the first world war, vest any rights growing out of the treaty.[5]

---

[5] In fact, the Alien Property Custodian proceeded throughout this period under the assumption that non-resident, enemy aliens could obtain no inheritance rights growing out of such treaties, following the advice of the then Secretary of State:

"The Secretary of State to the Alien Property Custodian (Palmer)

Washington, September 10, 1918.

"Sir: The Department acknowledges the receipt of your letter of August 30, 1918, in which you state that the question has arisen as to the present effectiveness of the treaties with Austria-Hungary and the various states composing the German Empire, 'which permits subjects of those states to take or hold real property in the

To give effect today to the dictum in the *Techt* case would be to fly into the teeth of the realities of the total and totalitarian war we have just come through. To have dedicated the lives and fortunes of the citizens of this country to the utter destruction of an enemy government *and* its people is hardly compatible with a notion that the commercial rights of those enemy peoples, as stipulated in a pre-war treaty, were to be preserved, during the struggle itself. Such a concept violates reason.

It is submitted that the only realistic rule as to the effect of a declaration of war upon treaties, other than those made in reference to war, or those designed

---

United States', and request that the Department indicate the attitude it is disposed to adopt in regard to these treaties.

"The Department assumes that you refer to the provisions in Article 2 of the convention of 1848 with Austria-Hungary: • • • and to the somewhat similar provisions in Article 14 of the convention of 1828 with Prussia, to Article 2 of the convention of 1845 with Bavaria, and to similar articles in conventions with other states of the German Empire which were regarded in force on the dates of our entrance into a state of war with Austria-Hungary and Germany, respectively.

"In reply to your inquiry as to the present effectiveness of these provisions of the treaties with Austria-Hungary and the various states composing the German Empire, you are informed that in view of the present state of war between the United States and Austria-Hungary and Germany, the Department does not regard these provisions as now in operation.

"In this relation it may be pointed out that in the absence of applicable treaty provisions the right of an alien to take or hold real property by descent or purchase, or otherwise; in the United States, would, it appears, depend upon the law of the state or territory in which the property may be situated."

"I am, (etc.)

Robert Lansing"

For. Rel. Supp. 2 (1918) p. 309; cited in VI. Hackworth, *Digest of International Law* (1943), p. 327, as contra to the dictum in *Techt v. Hughes*, *supra*. See also, Letter, Sec. of State Bayard to Messrs. L. & E. Lehman, June 23, 1884 (156 Ms. Dom. Let. 80).

to establish a permanent relationship which is already completely executed, is that treaties are suspended during hostilities subject to the right of victorious powers to revive them.[6]

The Head Money Cases, 112 U.S. 580, 599;
Society etc. v. New Haven, 8 Wheat. 464, 494;
Valk v. United States, 29 Ct. Cl. 62, aff'd 168 U.S. 703.

It is very significant to view the practice of states from the close of the Crimean War until the present time, as an indication of the views which controlled the political departments of the various states, those departments charged with concluding and interpreting treaties. Treaties of peace have revealed widespread recognition that former conventions, save those which were designed to regulate the rights of the parties as belligerents, were annulled by the occurrence of war. Frequently a treaty of peace has contained appropriate provision for the reestablishment of prior agreements, or has permitted the temporary operation thereof pending the conclusion of fresh arrangements. Reference to those agreements has assumed various forms; sometimes they have been "con-

---

[6]See in this connection, Chitty, *Legal Effect of War on Commerce*, pp. 1-2; Glenn, *International Law*, p. 152; Hall, *International Law*, Sect. 125; Halleck, *International Law and Laws of War*, pp. 371, 398; 2 Hyde, *International Law* (1922 ed.), pp. 91-98, Sections 547-551; 5 Moore, *International Law*, pp. 372-387; 3 Phillimore, *International Law* (3rd ed.), 794, Sects. 530-539; 2 Oppenheim, *International Law* (1940 ed.), Sect. 99; 1 Twiss, *International Law*, Sect. 252; Vattel's *Law of Nations*, Chitty's ed. 371; Wilson, *International Law*, Sect. 85; Annotation, 11 A.L.R. 180; Note, 15 Ill. Law Review 459.

firmed", sometimes "reestablished", sometimes "maintained". In almost every case, however, the compact terminating a war has marked the establishment of a new contractual relationship rather than the modification of an existing one. Arrangements concerning former treaties have not implied a recognition of their survival by operation of law, but simply an acknowledgment of the value of their provisions as a basis for fresh covenants.

See: 2 Hyde, *International Law*, (1922) 95.

Thus, according to Article XXXII of the Treaty of Paris, of March 30, 1856, concluded by Great Britain, Austria, France, Prussia, Sardinia and Turkey, it was declared that:

> "Until the treaties or conventions which existed before the war between the belligerent powers have been either renewed or replaced by new acts, commerce shall be conducted on the basis existing before the war; in other matters, the subjects of the contracting parties shall be accorded the most-favored nation treatment." (*Nouv. Rec. Gen.*, XV 780; Brit. and For. State Pap., XLVI, 17; Phillipson, *Termination of War and Treaties of Peace*, p. 357.)

According to Art. II of the Treaty of Vienna, concluded October 30, 1864, between Austria and Prussia on the one side, and Denmark on the other, "all the treaties and conventions concluded before the war between the High Contracting Parties are reestablished in so far as they are not abrogated or modified by the tenor of the present treaty." (*Nouv. Rec.*

Gen., XVII, Part 2, p. 475; Phillipson, *Termination of War and Treaties of Peace*, p. 260.)

See, also, Art. XIII of Treaty of Prague, of August 23, 1866, between Austria and Prussia (*Nouv. Rec. Gen.*, XVIII, 348; Phillipson, *Termination of War and Treaties of Peace*, p. 370), Article XI of the Treaty of Frankfort, of May 10, 1871, between France and Germany (*Nouv. Rec. Gen.*, XIX, 693; Phillipson, *Termination of War and Treaties of Peace*, p. 387), and Article XVIII of additional convention of December 11, 1871 (*Nouv. Rec. Gen.*, XX, 863; Phillipson, *Termination of War and Treaties of Peace*, p. 391), Article X of Treaty of Constantinople, January 27-February 8, 1879, between Russia and Turkey (*Nouv. Rec. Gen.*, 2 ser. III, 470; Phillipson, *Termination of War and Treaties of Peace*, p. 404.)

According to Article XI of the treaty of peace between Chile and Peru, of October 20, 1883, the commercial relations between the two countries were to be placed, pending the conclusion of a special treaty, on the same footing as prior to April 5, 1879. (Brit. and For. State Pap., LXXIV, 351. See, also, Art. III of treaty of peace between Spain and Chile, of June 12, 1883, *id.* 721; Phillipson, *Termination of War and Treaties of Peace*, p. 412.) In Art. VI of the treaty of peace between Japan and China, of April 17, 1895, all former treaties between those States were regarded as having been abrogated by the war. (*Nouv. Rec. Gen.*, 2 ser., XXI, 644; Phillipson, *Termination of War and Treaties of Peace*, p. 415.)

Article XII of the treaty of peace between Japan and Russia of August 23-September 5, 1905, proclaimed the annulment by the war of the treaty of commerce and navigation between those States. (For. Rel. 1905, 826; Phillipson, *Termination of War and Treaties of Peace*, p. 427.)

Article V of the treaty of peace between Italy and Turkey of October 18, 1912, announced that all the treaties and conventions subsisting between those States prior to the war should again "enter into immediate effect", and that the two Governments, as also their respective subjects, should be placed towards one another in the identical situation in which they had been before the outbreak of hostilities. (*Am.* VII, Supp., 59; *Nouv. Rec. Gen.*, 3 ser. VII, 8; Phillipson, *Termination of War and Treaties of Peace*, p. 431.)

By Article IV of the treaty of peace between Bulgaria and Turkey, of September 16-29, 1913, it was agreed to put into force and for a specified period a former treaty of commerce and navigation, and a specified consular declaration. (Brit. and For. State Pap., CVII, Part 1, 709; *Am. J.*, VIII, Supp. 31; Phillipson, *Termination of War and Treaties of Peace*, p. 443.)

By Article II of the treaty of peace between Turkey and Greece, of November 1-14, 1913, the treaties, conventions and acts subsisting between those States at the time of the rupture of diplomatic relations were to be restored upon the signature of the new

convention. (Brit. and For. State Pap., CVII, part 1, 894; *Am. J.*, VIII, Supp., 46; Phillipson, *Termination of War and Treaties of Peace*, p. 450.)

The conduct of the political departments of the various nations of the world at the conclusion of the first World War is especially significant, both because it was in conformity with the above, and because it bears on the intent of the parties to the treaty in issue. In Article 289 of the Versailles Treaty (The Treaties of Peace 1919-1923, *Carnegie End for Int. Peace*, p. 168) it was provided that each victorious power might, by giving notice to Germany within six months, *revive* such treaties as the victorious power desired.[7]

It appears to have been the general view among observers at the peace conference following the end of World War I that those treaties in effect at the outbreak of the war were considered to have been so affected by the occurrence of hostilities that it was necessary to revive them if it was desired to secure

---

[7] Article 289 of the Treaty of Versailles:

"Each of the Allied or Associated Powers, being guided by the general principles or special provisions of the present Treaty, shall notify to Germany the bilateral treaties or conventions which such Allied or Associated Power wishes to revive with Germany.

. . . . . .

"A period of six months from the coming into force of the present Treaty is allowed to the Allied and Associated Powers within which to make the notification.

"Only those bilateral treaties and conventions which have been the subject of such a notification shall be revived between the Allied and Associated Powers and Germany; all others are and shall remain abrogated."

the benefit of their provisions.[8] In other words, they are treated as being *revived* after the war, rather than having *survived* during the period of the war, if they are later invoked. And where no notification was given, the courts of the European states have, apparently, held that the pre-war treaties have been abrogated by the war.[9]

---

[8] "• • • The British Government has published no document showing the conclusions formed by it upon the effect of the Great War upon the different classes of treaties existing in 1914 between Great Britain and enemy powers. But an examination of the preparatory work done in anticipation of the Peace Conference and of Part X, Section ii of the Treaty of Versailles • • • suggests that the policy of the British negotiators in this respect • • • was probably based upon the following legal conclusions:

"(i) Bilateral Treaties—All treaties between Great Britain and an enemy State were regarded as *ipso facto* terminated by the war and as requiring express revival by the Treaty of Peace if it was desired that they should be in force again upon the conclusion of peace." McNair, *Law of Treaties* (1938), 548-551.

[9] The German Reichsgericht held, on May 23, 1925, that the provisions of the commercial treaties between Germany and Russia of February 10, 1894 and July 28, 1904, entitling their subjects to acquire real property in the territories of the other party, had lost their validity upon the outbreak of war. *Annual Digest*, 1925-1926, Case No. 331; XXXVI, *Zeitschrift für internationales Recht* (1926), 408. Cited in Hackworth, *Digest of International Law*, (1943), V, p. 379.

Appellant contends (Brief for Petitioner, p. 25, footnote 7) that the court below was in error in assuming that the treaty of 1828 was terminated by the war, and states that this treaty was terminated by the failure to give notice as required by the Treaty of Berlin, which extended to the United States the benefits of Article 289 of the Versailles Treaty. As to this contention, it is significant to note that the Italian Court of Cassation, in 1929, held that the effect of Article 289 of the Treaty of Versailles was not itself to abrogate Article 5 of the Italo-German convention of January 15, 1892 with respect to patents, but that the Treaty of Versailles merely confirmed the rule under which the outbreak of war between Germany and Italy extinguished that convention. *Società Walter Kidde v. Società Deutsche Werft*, *Annual Digest*, 1929-1930, Case No. 281; 21 *Rivista di diritto internazionale* (1929) 418-420, cited in Hackworth, *Digest of International Law* (1943), V, p. 381.

The United States refused to join in ratifying the Treaty of Versailles, and peace between this country and Germany was concluded by the Treaty of Berlin of 1921. (42 Stat. 1939.) This treaty contained an article identical with that of article 289 of the Treaty of Versailles. (42 Stat. 1943.) In 1921, Congress had passed a joint resolution (40 Stat. 1943, July 2, 1921) which in effect had appropriated or confiscated all property of Germany of German Nationals which on or since April, 1917, had come into the possession or control of the United States. This resolution was held in *Cummings v. Deutsche Bank,* 300 U.S. 115 (1936) to have vested title to such property absolutely in the United States. The treaty of Berlin in 1921 had ratified the action taken under the resolution. The Treaty of 1828 with Prussia contained an article substantially similar to Article IV of the present treaty (Treaty with Prussia, May 1, 1828, Article XIV, 8 Stat. 378) relating to reciprocal rights of inheritance. If the treaty of 1828 survived the outbreak of war, and thus guaranteed property rights in German nationals by way of inheritance during that war, it would not have been necessary to have negotiated a new convention covering the same ground in 1923. The historical facts demonstrate, however, that the government of the United States, during the war, confiscated property belonging to German nationals, otherwise protected by a treaty, and, subsequently, we have the consent and ratification of the German government to this action. It would not appear likely that, pursuant to such a course of conduct followed

on a similar occasion, the same parties would intend or believe that the Treaty of 1923, unlike the Treaty of 1828, its predecessor, would survive a war.

The practice of nations, then, when dealing with the actual, practical fact of the effect of war on treaties, has not been to assume their continued existence. The action of victorious powers at the peace conference table in reviving pre-war treaties is the revitalization of treaties which were suspended in effectiveness during the hostilities, and marks a new contractual arrangement covering the same subject matter as the old. For this reason, care must be taken to distinguish those cases which state, either by decision or dicta, that certain treaty provisions are revived after hostilities cease. Thus, the cases of *Karnuth v. United States*, 279 U.S. 231[10] and *The Sophie Rickmers*, 45 F. (2d) 413, cannot be cited as authority for the proposition that certain treaty provisions continued in effect during the war. No federal case can be found where the court has held that a treaty continued in force *during* a state of hostilities between the contracting parties.[11]

In relying upon the dictum in *Techt v. Hughes, supra*, petitioner attempts to apply the test, upon

---

[10]The *Karnuth case* held that war abrogated the Treaty of 1794 and by dictum only said that not *all* treaties were abrogated by war.

[11]Appellant inadvertently states that the rule that "war abrogates only those treaty provisions whose continued existence is incompatible with the state of hostilities" is the rule of "this Court" (Brief for Petitioner p. 8, Paragraph A.) That is the rule expressed in the New York Court in *Techt v. Hughes, supra*, and has never been adopted in this Court.

which that court rested its decision, namely that "provisions compatible with a state of hostilities" (229 N. Y. at 241) would be enforced, to the facts of this case, in which, as distinguished from the *Techt Case,* the rights of enemy aliens resident in enemy country are involved. The touchstone in appellant's view which serves both to preserve the alien's rights under the treaty, and yet serves to prevent his acquiring any property interest which he might use or enforce is the Trading with the Enemy Act (50 USCA App.), (Brief for Petitioner pp. 18-20.) Essentially, the argument of appellant concedes that the Treaty of 1923 could not be enforced now, that it would not have survived the war, if it were not that the existence of the Trading with the Enemy Act prevents the Treaty from having any practical, legal effect. It is not valid to urge that the Treaty persisted throughout the war simply because of the fortuitous existence of a statute which prevented any of the persons intended to be benefited thereunder from attaining any of the benefits. The federal statute, admittedly, was not enacted specifically to reach rights obtained through inheritance alone, but all manner of property rights. (Cf. footnote 5, page 19, supra.) The possibility that the federal statute may be repealed, or amended so as to exclude, specifically, rights obtained by inheritance, or that it may, in the discretion of the Custodian, be administered so as to exclude rights of inheritance (Brief for Petitioner, p. 19), would, in the event of a holding that such treaty provisions remain effective during a war, leave little in the way of "other

safeguards" (Brief for Petitioner, p. 17) to prevent the enrichment of alien enemies in hostile territory.

One difficulty of the appellant's argument is that it completely disregards the content of the words that are used. When he contends the treaty has not been abrogated or suspended and states: "The succession by a German to mere ownership of property in the United States could have offered no possibilities of impeding our military or economic mobilization", (Petitioner's Brief, p. 17) the "mere ownership" he is talking about is the bundle of rights given by the treaty. An examination of those rights discloses them to be fairly considerable, so considerable in fact that there must be "other safeguards" (Petitioner's Brief, p. 17) to prevent the Germans having the rights given by the treaty, from asserting them in a "way prejudicial to our national interest". (Petitioner's Brief, p. 17.) The "other safeguards" is of course the Trading with the Enemy Act. The need for the "safeguards" is a confession of the fact that the rights given by the treaty are not compatible with a state of hostilities.

2. The effect of the Trading with the Enemy Act upon the existence of the Treaty.

Article IV of the Treaty of 1923 with Germany is a war casualty in another respect than the effect of the war alone—The Trading with the Enemy Act (50 U.S.C. App.; 40 Stat. 411 as amended, 55 Stat. 838) is a federal statute, later in date, and in terms and effect so irreconcilable with and contrary to Article

IV that the latter must be regarded as inoperative since the date of the declaration of war against Germany.

The particular article of the Treaty in issue purports to guarantee to German nationals the right to have full power to dispose of their personal property of every kind in this country, and in respect to real property, to have a term of three years to take and sell the same "without restraint or interference" (See Appendix A, p. i.) The federal statute, on the other hand, from and after December 8, 1941 (before the death of decedent in this case) made it unlawful for any German national to enter the United States, to have any communication of a business nature here, to remove property or money from the United States, and it was unlawful for any national of the United States to have any dealings or communications with German nationals. In short, no money or property could be taken out of this country to Germany or for its nationals (Trading with the Enemy Act, Sects. 7 (c,d) and 5, as amended by First War Powers Act, 55 Stat. 839.) (See footnote 15, p. 54 infra.)

Appellant contends that none of the provisions of the federal statute is irreconcilable with the right of an alien to inherit property, asserting that neither entry into the country nor communication with persons in this country, nor withdrawal of the proceeds of inheritance is indispensable to any enemy heirs "succession to ownership". (Brief for Petitioner p.

19.) This fails to recognize, however, that the essential guaranty of the treaty itself is not that of a bare, dry legal title to property, but that of most of the fundamental incidents of title, namely the right to take, use, and dispose of the property. Under the express provisions of the federal statute none of these basic attributes of ownership accrues to the alien. Ownership is a word used to connote the rights, privileges, powers and immunities that one has in respect to something. From the standpoint of the Germans in this case it connotes the rights given them under the treaty. There is no such thing as ownership in a vacuum. The provision in the statute that the Custodian may license such taking does not enlarge the rights purportedly guaranteed to the alien under the treaty, but, instead, puts a condition thereon not contemplated by the treaty, and contrary to the purpose of the treaty. There is clearly an irreconcilable conflict between the rights of ownership purportedly granted by the Treaty, and the provisions of the Trading with the Enemy Act which nullify all of the incidents of such ownership. Ownership without incidents is nothing. (See: Fundamental Legal Conceptions, Hohfeld, Wesley N.: The Law and Mr. Smith, Max Radin.)

The Custodian's power to vest alien property cannot be reconciled with the grant of power by the Treaty to aliens to take. Both powers stem from the same source, namely the will of the federal govern-

ment to enforce them.[12] Appellant attempts to distinguish the two by pointing out that the *administrative* act of actual vesting may be delayed for some *period* of time after the death of the decedent, and therefore contends that while the rights of the alien accrue at the time of the decedent's death, the vesting order must take effect at some future time. Brief for Petitioner, p. 20.) While it is true that the vesting order may be made at some time after the death of the decedent, the rights and powers of the Custodian accrue at the same instant that the rights of the heir, be he alien or American, accrue, namely the instant of the death of the decedent. This has always been the law.

Thus, in the leading case of *Miller v. Rouse* (S.D. N.Y. 1921) 276 F. 715, the Custodian had petitioned to compel summary payment by the executors of Callman Rouse of certain claims alleged to be due to Ruth Marcuse, formerly an alien enemy. One of these claims was for $4500 and was granted, as being a debt owed to Ruth Marcuse. As to the demand for $10,000, which was found to be a legacy, Judge Learned Hand said (276 F. at 716):

---

[12]Appellant's contention (Brief for Petitioner, p. 19) that the power to vest does not conflict with an alien's right to inherit because the Custodian merely possesses "authority" to vest and not a "mandatory" duty, raises dereliction of duty on the part of an administrative official to the dignity of a constitutional principle. Failure of the Custodian to vest the property interest of an enemy alien resident in a hostile country should most certainly lead to the appointment of a new officer, rather than endowing the alien with any new right.

"To the legacy of $10,000 different considerations apply. The other demand * * * determined that the alien, Ruth Marcuse, had 'a certain right, title, and interest as a beneficiary under the will of Callman Rouse', and thus was duly demanded, the demand operating as a capture. * * * *However, this capture did no more than substitute the Custodian in the place of the beneficiary;* it did not profess to determine what her rights were as such, and in the absence of such determination there is no specified fund or obligation on which the capture can operate. *The capture has put the Custodian in the place of Ruth Marcuse, but he must work out his rights in accordance with the determination; he becomes entitled to all rights which she had as beneficiary under the will of Callman Rouse and no more.* * * * No summary demand can go on that demand; *the Custodian is merely a legatee under the will.*" (Emphasis added.)

Accord: *Kahn v. Garvin* (S.D. N.Y. 1920) 263 F. 909.

Further, appellant's argument that the Custodian's vesting order operates only as of the time of its issuance, and that the Custodian secures his rights as of that time while contrary to the settled law, as illustrated by the two cases above, is also contrary to a position taken by the Custodian in a recent case. Thus, in *In re Nossen's Estate,* (Mont.) 162 P. (2d) 216 (1945), the decedent died in 1935 leaving six heirs, five of whom were nationals of Germany, resident therein. No distribution of the estate was sought

until after the war started. In 1939, however, Montana had enacted a reciprocal inheritance statute very similar to the California statute in issue (Section 2, Ch. 104, Laws of Montana (1939); see Appendix C., p. x), but which provided for escheat of the interests of the foreign heirs, reciprocity not existing, rather than the local heir taking the entire estate, as the California statute provides. The Custodian vested the interests of the German heirs after the war started, contending that his *right* to take vested at the same instant that the right of the German heirs vested; the Attorney-General, for the State of Montana, attempted to advance the theory here espoused by the Custodian, namely that the latter's right dates only from his vesting order and that, hence, the Custodian must establish his right under the reciprocal inheritance statute. The court held that the Custodian was correct, and that his right to vest bore no relation to the time he issued his order, that since this right vested in 1935, on the date of the death of the decedent, the reciprocal inheritance rights statute did not govern the case.

In the case of inheritance rights based on the treaty, the right of the alien and the right of the Custodian are in complete variance. The right of the Custodian to take must depend upon the right of the alien to take; but since the right of the alien to take in this case depends upon a treaty, and since the power of the Custodian is granted in a subsequent federal statute which in terms and principle denies the rights

granted by the treaty, on what basis can the alien now claim any right? The right of the alien to take does not depend on any action taken by the Custodian, as the Trading with the Enemy Act does not purport to create any property rights. The fundamental issue is the basis of the alien's claim to a property right, and that is to be found in the treaty alone. The statute forbids the alien to exercise any of the rights granted by the treaty. The statute is a denial of rights in the alien, and was promulgated by one of the parties to the treaty.

It is, thus, impossible, to avoid the conflict between the treaty and the federal statute—there is not, either in fact or theory, any lapse of time between the accrual of a right in an enemy alien and the accrual of the right to vest in the Custodian. The right of the federal government to take rests upon a claim of power which, in theory and effect, denies the right of an alien to take, pursuant to a former grant of power by the federal government and must be held to have abrogated the first grant of power.

The mere possibilty that part or all of the property thus vested and taken may, ultimately, be returned to the alien does not alter the essential nature of the original taking. This taking is in the nature of a confiscation.

United States v. Securities Corporation General (Ct. App. D.C. 1925) 4 F. (2d) 619;

Cummings v. Deutsche Bank, 300 U. S. 115 (1936).

See:

"Enemy Property", 11 *Law and Contemporary Problems* (1945) pp. 79, 142.

Any return of the property seized would not be the confirmation of any right in the aliens, but a mere matter of grace to the vanquished.

Cummings v. Deutsche Bank, supra.

See:

United States v. White Dental Co., 274 U. S. 398, at pp. 402, 403.

It is well settled by decisions in the federal courts and in this court that in the event of a conflict between a treaty and a statute of Congress the one later in date must prevail.

Taylor v. Morton, 2 Curtis, 454 (Cir. Ct. D. Mass. 1855), Fed. Cas. No. 13,799;

In re Clinton Bridge, 1 Wool. 150 (Cir. Ct. D. Ia. 1867), Fed. Cas. No. 2900;

The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870);

Ropes v. Clinch, 8 Blatch. 304 (Cir. Ct. S.D. N.Y. 1871), Fed. Cas. No. 12,041;

Hijo v. United States, 194 U.S. 315, 324 (1903);

Fong Yue Ting v. United States, 149 U.S. 698 (1892);

Rainey v. United States, 232 U.S. 310 (1913);

George E. Warren Corp. v. United States (CCA 2, 1938), 94 F. (2d) 597;

Chinese Exclusion Case, 130 U.S. 581;

Whitney v. Robertson, 124 U.S. 190;

The Head Money Cases, 112 U.S. 580.

The language of Justice Curtis in *Taylor v. Morton*, supra, the leading case for this doctrine, is particularly cogent (Fed. Case No. 13,799, at p. 785):

> "If the act of Congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just interpretation of the treaty, or an accurate knowledge of the facts of likeness or unlikeness of the articles [of trade items involved], or whether it was an accidental or purposed departure from the treaty; and if the latter, whether the reasons for that departure are such as commend themselves to the just judgment of mankind. It is sufficient that the law is so written. * * *"

And, in *Ropes v. Clinch*, supra, Fed. Case No. 12,041, at page 1174, Justice Woodruff, as to the absence of an expressed intention in the statute to modify the treaty, had this to say:

> "So, they (Congress) may render it (the treaty) inoperative by legislation in contradiction of its terms, without formal allusion at all to the treaty; and generally, they may legislate as if no such treaty existed, in modification or alteration of what, by force of the treaty, has been the law heretofore, thus modifying the law of the land."

Both on authority and in theory no other rule is practical or possible. What prerogative does the court have to choose between a prior treaty and a subsequent, conflicting statute?

Rainey v. United States, 232 U.S. 310, 316 (1913).

Since, for the court, both have the equal force of law, the court must treat the situation as the same created by two conflicting statutes, of which the one later in time prevails. Any embarassment, which may result from such action, as to our foreign relations, is a problem to be met by the political department of the government.

The Cherokee Tobacco, supra, at p. 621.

Petitioner cites two cases as authority that a treaty will not be deemed to have been abrogated by a later statute unless an intention to abrogate has been clearly shown.

Cook v. United States, 288 U.S. 102; and
Chew Heong v. United States, 112 U.S. 536.

The latter case is not in point, as the court simply construed the statute so that it did not conflict with the earlier treaty. The decision in the *Chew Heong Case* is that the court will try to avoid an interpretation of a statute enacted in 1882 which would, if otherwise interpreted, conflict with a treaty recently concluded, in 1880. *Cook v. United States,* supra, involved a situation which differs materially from that now before this court. The issue before the court involved the legality of the seizure of a British ship carrying contraband liquor at a point 11½ miles off our coast. Section 581 of the Tariff Act of 1922 gave jurisdiction to our revenue cutters up to four leagues (12 miles). The Treaty of 1924 with Great Britain, however, limited our jurisdiction as to British ships to a point one hour's sailing time from shore, which might be more or less but in the instant case was less

than that provided in the statute. In 1930, the Tariff Act was reenacted, with changes in other sections, but without changing Section 581, relating to the 12 mile limit. The question before the court, on this issue, was whether this reenactment modified the treaty. The court held that it did not, citing the *Chew Heong Case* and *United States v. Payne,* 264 U.S. 446. A primary factor in the court's decision was the fact that the department charged with enforcement of the Tariff Act had, even subsequent to the reenactment of the section in issue, instructed its officers to continue to follow the treaty. The decision of the court is very probably based on the notion that Congress had been guilty of an inadvertence in not changing the section to conform to the exception in favor of the British when the entire act was reenacted; the department of the government concerned with enforcement of the act had so assumed in issuing its regulations.

The letter from the Department of State, cited in appellant's brief (Brief for Petitioner, p. 25, pp. 85-92) as authority that the political branch of the federal government considers Article IV of the treaty to be still in effect, is based largely on the judicial reasoning found in the court decisions discussed therein. It discusses none of the political elements relative to the inconsistency between the Trading with the Enemy Act and the continued existence of Article IV of the Treaty, nor does it advert to the problem raised by the collapse of the German state.

Thus, it has been suggested that *Karnuth v. United States*, 279 U.S. 231 (1929), cited in the above letter (Brief for Petitioner, pp. 86, 87), and which case held that certain provisions relative to immigration in the Jay Treaty with Great Britain had been abrogated by the War of 1812, might well have rested on the fact that, in 1927, the government found the privileges granted by this Treaty provision to be inconsistent with its immigration policy.

38 *Yale Law Journal*, 1150.

In other words, the political department, namely, Congress, acting through the immigration regulations, which were inconsistent with the treaty, had taken *action*, and the latter was held to nullify the Treaty. This is the essential effect of the case. And this is essentially respondent's position—that the political department has already *acted* in respect to the continued existence of Article IV by the Trading with the Enemy Act as amended which, by its conflict with the Treaty, must be held to have voided its provisions.

The Acting Secretary of State concludes the letter (Brief for Petitioner, p. 92) with the supposition that, since *Techt v. Hughes* had already been decided prior to the Treaty of 1923, the framers thereof had this case in mind and could have added a provision nullifying the effect of this case on Article IV, if they had so desired. However, the *Techt* case was decided in 1920, after the cessation of hostilities and before the consummation of the Treaty of Versailles. Article 289 of the Versailles Treaty (Carnegie Endow. for Int. Peace, *The Treaties of Peace*, p. 168; see p. 25,

fn. 7, supra) which article was subscribed to by the United States under the later Treaty of Berlin (42 Stat. 1939, 1943), provided that each victorious power might revive treaties with Germany by giving notice within six months. This latter provision is *action* by our political department, which shows that the treaties were considered at least suspended during the war; and the court in the *Techt* case, therefore, had indulged in a rather violent presumption in assuming that the treaty in question had persisted through the war.[13]

The letter of the Department of State (Brief for Petitioner, pp. 85-92) is not determinative of this issue. It is a mere, gratuitous expression of an opinion by an Under Secretary of State in the capacity of Acting Secretary of State, in reference to a matter not before the department for decision or action, and upon which the action of no other governmental agency was predicated; it is decisive of nothing. In

---

[13]Further, it is interesting to note, in considering the feasibility of proceeding on such presumptions in the face of inconsistent conduct by the political branch of the government, that *State v. Reardon*, 120 Kans. 614 (1926) (cited in Brief for Petitioner p. 90) held that a similar provision in the Treaty of 1828 with Prussia (8 Stat. 378) had survived the war, and relied entirely on the *Techt* case. Subsequently, in a letter to the Harvard Law Review, the then Under Secretary of State revealed that the government did not consider that treaty to be in existence—

> "This Government considered the matter and it was not deemed advisable to give notice within the period referred to in Article 289, as extended by paragraph 5 of Article II of the Treaty (of Berlin) • • •, of its intention to revive the Treaty of 1828 between the United States and Prussia. In the circumstances, the Department does not consider that the Treaty of 1828 was effective in 1924 • • •" (40 Harvard Law Review 752, fn. 29).

contrast, it is worthy of note that in January of 1940, California Attorney-General Earl Warren requested the Honorable Cordell Hull, then Secretary of State, to render an opinion relative to this same question in respect to the Treaty here in issue; and the Attorney-General reported that

> "He (Secretary Hull) states that the question as to the effect of war upon the operation of those treaties is one upon which his Department has not taken any definite position, and that it would appear to be one which judicial tribunals may decide."
>
> Opinion of Attorney General, Letter to Hon. Harry B. Riley, State Controller, July 15, 1942, p. 11-NS4451.

The letter cited and quoted by appellant does not bind the political department of the government to any course of action in respect to the Treaty, nor does it profess to be more than a discussion and review of *judicial* decisions bearing on the problem. Even if the letter had expressed an opinion based on political considerations, such as have been outlined here, it is doubtful whether it would have shown a "*decision* of the political department", which is the aid the courts should seek on this issue.

See: Note, 28 Mich. L. Rev. 318, footnote thereto.

It would seem, then, that there is a direct and inexorable conflict between Article IV of the Treaty of 1923 with Germany, and the Trading with the Enemy Act, as amended by the First War Powers Act of

1941. In view of this conflict, and with an appreciation of the circumstances in which the conflicting statute was enacted, the court can only hold that the intention of Congress to abrogate the rights granted by the Treaty was clearly manifested. Once petitioner admits the comprehensiveness intended in the Trading with the Enemy Act (Brief for Petitioner, p. 23) it is not particularly remarkable that it reached into fields not originally anticipated by Congress. In theory and fact, the federal statute operates to void the basis of any rights in enemy aliens, namely the Treaty, and in the field of inheritance the only rights the aliens can claim are based on the Treaty—when these are taken away nothing remains—either of the rights or the Treaty.

3. The effect of the collapse of the German State, and the cessation of its existence as an international personality.

On a third basis, the Treaty of 1923 with Germany must be held to have failed to survive the war. Germany, as a result of the hostilities, has ceased to exist as an independent, national or international community. There is, in the geographical area which once comprised this entity, no central government of any sort, and only a very limited form of local government, all of which is closely supervised by the conquering military authorities. The country no longer exists as a single political entity, but has been divided into several areas of control. There is, further, no present guarantee that the German State will ever again exist as an independent, international

personality. These are facts of common knowledge, and of which this court may take notice. Further evidence, however, of this state of affairs lies in the pronouncement of the victorious powers, which characterize the complete collapse of the German State and the entire lack of any national, responsible government.

> "There is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers".
>
> Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Department of State Publication 2423, p. 62.

> "* * * The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings, or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nation without the sanction of the Allied Representatives." Agreement between Governments of the United Kingdom, United States of America, and USSR, and the Provisional Government of the French Republic, made in Berlin, Sept. 20, 1945. *The Axis in Defeat*. Department of State Publication 2423, p. 72.

The practical effect of this state of affairs upon the continued existence of the Treaty is simple and clear. Treaties are essentially contractual, bilateral in na-

ture, requiring the continued mutual consent, existence, and ability to perform on the part of both of the High Contracting Parties thereto.

> "Treaties are consensual in their nature; the obligations of its predecessor are deemed to be accepted by the successor state." *The Sophie Rickmers*, 45 F. (2d) 413, 417.

The inability, then, of one of the parties to the Treaty to continue performance, under the Treaty itself, must put a period to the existence of this international contract.[14]

The effect of the extinction of state life upon the existence of the treaties to which the erstwhile political entity had been a party is not a new question in international law. There is, moreover, universal agreement among the text authorities that the effect of such an occurrence is to end the treaties entirely.

> "Whether coercive or voluntary, the extinction of the state as an international person puts an end to its own international rights and obligations. All treaties concluded by it become as legal contracts null and void. All its rights at international law cease to be enforcible in its own name: none of its obligations can be pressed against it

---

[14]The International Commission of Jurists, meeting in Rio de Janeiro in 1927, adopted the following, proposed doctrine relating to the expiration of treaties:

Article 14, Project IV.

A treaty ceases to be effective:

. . . . . .

(c) When a condition rendering it void has happened.

. . . . . .

(g) When it becomes incapable of execution.

Cited in 22 *Am. Jnl. of Int. Law, Spec. Supp.*, p. 245.

as a legal person. Its former rights must henceforth be asserted, if at all, and its obligations must be met, if at all, by the state which has absorbed it." Fenwick, *International Law* (1934), p. 121; see also Wilson, *Handbook of International Law* (1939), p. 221; Halleck, *International Law*, Sect. 35, Chapt. 18; Wheaton, *Elements of International Law*, Sect. 275; McNair, *Law of Treaties* (1938), p. 389.

Among the examples of such extinction of state life which resulted in the termination of the treaties to which the country had been a party, are Poland in 1795, Transvaal in 1901, Korea in 1910, Texas in 1845, Montenegro in 1919, and the division of Columbia in 1829-1830.

The policy of our own government has, from the very first, been in substantial agreement with the rule above expressed, and have adhered to it both when this country was in the position of the annexing or absorbing power (Texas, Hawaiian Kingdom), and when some other power applied it to annexations affecting the foreign relations of this country (see Hyde, *International Law* (1922), Sect. 543). In the history of the relations of the Netherlands to the United States there is an interesting case in point, involving the existence of the Treaty of 1782 (8 Stat. 32) between the United States and the Netherlands. In 1793 war broke out between France and the United Provinces of the Netherlands; in 1795 the Stadtholder was driven out, and the Kingdom of Holland was formed as part of the French Empire; in 1814, at the

Congress of Vienna, the Kingdom of The Netherlands was formed. As to the effect of those developments, the Dutch foreign minister maintained that from 1795 to 1814 "the political existence of Holland was then terminated", that "Holland had ceased for a long time to form an independent state". To this contention the United States agreed and acquiesced in Holland's theory that the Treaty of 1782 had not survived. (Summarized in Davis's *Treaty Notes*, Treaty Volume (1776-1887), p. 1235; also in V Moore, *Digest of International Law*, pp. 344-5.)

The law and the practice of nations in the face of this question was brought into issue at the time of the American annexation of the Hawaiian Kingdom. The policy of our government, and the rule of international law which governs, was most clearly expressed by Secretary of State Sherman in a letter to the Japanese Minister at Washington in respect to this annexation:

> "* * * the history of Europe, of America, of the whole world is full of examples from remote periods to our own days, where independent States have ceased to be such through constrained or voluntary absorption by another, with attendant extinction of their former treaties with other States. It needs no stipulation in a formal annexation treaty to work this result, for it attends *de facto* annexation however accomplished. The forcible incorporation of Hanover, into the Prussian kingdom instantly destroyed previous Hanoverian treaties. The admission of Texas to Statehood in our Union by joint resolution ex-

tinguished the treaties of the independent Republic of Texas * * *" 2 Hyde, *International Law* (1922), Sect. 543; V Moore, *Digest of International Law*, p. 349.

This issue has never been clearly presented to any American court. Those cases which arose out of the problems attendant upon the formation of the German Empire in 1871 and the effect of this upon the treaties which this country had previously concluded with the individual states of that Empire are distinguishable and are largely inconclusive of this question. In the first place, the German Empire was formed by the *voluntary* adhesion of the member states, each of which relinquished only a portion of its sovereignty; and, further, both the Imperial German Government and our State Department agreed to honor and enforce the treaties which had been concluded between this country and the member states of the Empire,—in effect a new treaty arrangement was made. These facts, to which the court adverted, clearly distinguish the case of *Terlinden v. Ames*, 184 U.S. 270 (1901), from the instant case. (Cf. *In re Strobel's Estate*, 39 N.Y.S. 169.) Petitioner cites the *Terlinden* case (Brief for Petitioner, p. 24, fn. 6) as authority for the proposition that the continued power of a state to perform its treaty obligations is a political question for the political departments to decide. That proposition is undoubtedly true when the parties to the Treaty are either both still *in esse* (cf. *Charlton v. Kelly*, 229 U.S. 447) or there has been a successor state to which one has voluntarily assigned the con-

duct of its foreign affairs (*Terlinden v. Ames*, supra) so that the question is really not one of *power* or *ability* to perform, but whether the other party is willing to perform; in other words, when it is a question of *violation* of a Treaty which is raised in court, that is a question, clearly, for the political department of the government to meet. In the instant case, the question before the court is purely within the judicial province: is there another, presently existing party to the Treaty of 1923 which has the power to perform its stipulation? The answer is clear and the effect of that answer is clear: one party to the treaty has become extinct; and, as a result, the treaty cannot exist.

In the instant case there is no successor state to which the obligation of reciprocity can fall. There has been a complete lapse in the existence of a responsible national government of Germany, brought about by a devastating military defeat. The failure of the Treaty of 1923 due to this collapse of one of the contracting parties, and the lack of a successor state, leaves the Custodian without a cause of action. (*The Schooner Peggy*, 1 Cranch. 103.)

B. ARTICLE IV OF THE TREATY OF 1923 DOES NOT GOVERN SUCCESSION BY GERMAN NATIONALS TO PERSONALTY OF DECEDENT AMERICANS.

The second paragraph of Article IV of the Treaty of 1923 with Germany is concerned with reciprocal rights of inheritance of personal property, and reads as follows:

> "Nationals of either High Contracting Party may have full power to dispose of their personal prop-

erty of every kind within the territories of the other, by testament, donation or otherwise, and their heirs, legatees and donees of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases".

In language, it is quite clear that this provision does not guarantee reciprocity of rights of inheritance in those cases where the decedent is a national of the country of his death, and the legatees are nationals of the other contracting party. Appellant argues that the two clauses of the first sentence of this paragraph were intended to, each, fulfill a separate purpose—the first clause to provide for the disposal, by Germans, of their property in the United States, and the second clause to ensure that Germans would succeed to personalty left by Americans, decedent in the United States. Initially, by a process of dissection of the clauses and their relation to each other, appellant attempts to show, aided by judicious transposition of words and phrases (Brief for Petitioner p. 36) that the two clauses guarantee reciprocity of inheritance rights regardless of the nationality of the decedent.

In addition, appellant devotes some 35 pages of his brief (Brief for Petitioner, pp. 32-67) to the development of the historical background of Treaty clauses

similar in tenor to the one in issue, in an effort to demonstrate that, originally, the parties to such Treaties intended to create reciprocity of inheritance of personalty regardless of the nationality of the decedent.

On the face of the Treaty itself, it is difficult to escape the conclusion that, applying a purely objective test, such as might prevail if the issue were as to a contract between private parties, the oaths of twenty bishops would not prevail to establish that the parties to the Treaty had provided for reciprocity in every case. Thus, reading the paragraph in a straightforward manner, it provides that "Nationals of either High Contracting Party may have full power to dispose * * * within the territories of the other * * * and their heirs * * * wherever resident * * * shall succeed * * *". In absence of a patent ambiguity on the face of the Treaty it would appear that the parties had provided for reciprocity only where the decedent was a national of the country other than the one in which his death occurred, and that they had intended to protect the estates of their own nationals who died in the other country.

The most respectable case authority is in accord with this view. In *Frederickson v. Louisiana*, 23 How. 445, Article III of the Treaty of 1844 with Wurtemberg (8 Stat. 588, 590), which was identical with the article presently at issue, came before this Court. A Louisiana statute, Sec. 7, Act 315, 1855, Acts La. pp. 398, 399) provided for a succession tax of 10 per cent on legatees not domiciled in the United

States. This Court affirmed the decision of the Louisiana court and held that this statute did not discriminate between aliens and citizens because it taxed all legatees domiciled abroad without regard to their citizenship. The Treaty was held to be no obstacle to the tax because since the decedent in the case was an American, the Treaty did not apply. Accord: *Moody v. Hagen,* 36 N.D. 471 (1917) affirmed *per curiam* under the title *Skarderud v. Tax Commission,* 245 U.S. 633 (1917) (Article XVII, Treaty of 1827 with Norway, 8 Stat. 346, 354); *Peterson v. Iowa,* 245 U.S. 170 (1917) (Article VII, Treaty of 1826 with Denmark, 8 Stat. 340, 342); *Duus v. Brown,* 245 U.S. 176 (1917) (Article VI, Treaty of 1783 with Sweden, 8 Stat. 346, 354).

Petitioner's fundamental thesis is that this Court in the *Frederickson* case, supra, was not made aware of the historical background of such clauses, and that the decision, and the cases which followed it in 1917, were in error. Assuming that petitioner's development of the historical background is sound, it is difficult to explain why the treaty-makers, in 1923 for example, failed to take steps to rectify the error by a suitable modification of the language of this particular provision. It would seem, further, that a decision of this Court in 1860, and followed again in 1917, had so established a rule of law that a failure on the part of those concerned with the drafting of treaties to modify them to avoid that rule must be taken as acquiescence in that rule.

There is no ambiguity on the face of the treaty, and hence no apparent reason for resorting to extrinsic evidence to derive the intent of the parties thereto. This view is further strengthened by the rule of the *Frederickson* case in 1860 and the fact that no effort was made by the draftsman of the Treaty of 1923 to avoid that rule. The parties must be presumed to have intended to protect only the estates of Germans dying in the United States. Since the decedent in this case is assumed to have been an American (Brief for Petitioner pp. 10, 29), it is apparent that this treaty does not govern the transfer of the personalty in her estate.

II. THE CALIFORNIA STATUTE IS VALID, APART FROM THE TREATY, AND DOES NOT INVADE THE FEDERAL FIELD OF CONTROL OVER FOREIGN RELATIONS.

The effect of the California statute, in either its original or its amended form,[15] is to grant to aliens a

---

[15]Appellant assumes, in his argument on this issue (Brief for Petitioner, p. 68, fn. 46) that the amended statute only applies to this case (see pp. 69-74 infra), contending that the original statute of 1941 is invalid for additional reasons. These additional reasons were that the 1941 form of the California statute not only required reciprocity, but also proof of the right of American citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir (Ch. 895, Calif. Statutes, 1941). This condition is, appellant alleges, invalid as a regulation of foreign commerce. The Treaty itself, however, provides, in addition to reciprocity, that there is to be the additional right to "withdraw the proceeds thereof, without restraint or interference" and, as to personalty, that the successors in interest "may take possession thereof" (44 Stat. 2135). The 1941 California statute merely reiterates the requirements of the Treaty itself. This requirement facilitates foreign

right to inherit property in California if a reciprocal right in favor of American citizens exists in the alien's country. This statute is characterized by appellant as invalid, as an invasion of the field of foreign relations exclusively reserved to the federal government. (Brief for Petitioner, pp. 68-75.) The issue thus raised is more important in its broad implications, than for

---

commerce, if the acquisition of interests in foreign estates be such (Cf. *Mayer v. Grima*, 49 U.S. 490), and is to be contrasted with the factual situation in *Henderson v. Mayor of N.Y.*, 92 U.S. 259; *Chy Lung v. Freeman*, 92 U.S. 275, and *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, in which the state regulations were a direct impediment to the free flow of incoming foreign commerce and peoples.

If, by this contention, appellant is conceding that the Treaty no longer guarantees that American citizens have the right to "withdraw the proceeds" of foreign estates, nor to "take possession" of personalty, then appellant is conceding that the T aty is no longer operative:

"* * * In every international treaty a resolutive condition is always implied in cases where the essential conditions of the treaty can no longer be carried out by one of the contracting parties. Under the Hague Treaty (July 17, 1905) aliens are only exempted from giving security for costs when the recovery of sums which the plaintiff may be ordered to pay is practicable. On account of the present economic relations between France and Italy, arising out of the application of the sanctions imposed by the League of Nations, the Italian Government has just forbidden for an indefinite period all export of capital. It is notorious that debts owed by Italians to aliens are compulsorily paid into blocked accounts, and that the foreign creditors cannot dispose of the sums paid into their accounts unless they can prove that they are to be used again in Italy. * * * This prohibition of the export of capital by Italians makes it not only impossible for a French national to recover sums due to him from an Italian subject, but also makes it impossible for an Italian to pay his debts abroad. Under the circumstances, this prohibition stands in the way of the provisions of the Hague Treaty". *Bertacco v. Bancel et Scholtus*, CB *Revue Critique de droit international* (1937) 95, 96-97, translation: *Annual Digest*, 1935-37, Case No. 201, cited in Hackworth, *Digest of International Law* (1943), V, p. 299.

its possible effect in this case.[16] The entire question of implied limitations upon state power arising from constitutional grants of power to the federal government is one that is largely unsettled; it is possible, however, to adduce from the decisions of this court certain large areas of permissible governmental action, upon the part of either state or federal government, *which are valid* even though there is an incidental effect which touches upon the other's field.

The states have the exclusive power to regulate the right of inheritance, succession and testamentary disposition of all property within their borders.

> "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U. S. 556, 562 (1941); Accord: *Mager v. Grima*, 49 U. S. 490; *Lyeth v. Hoey*, 305 U. S. 188; *Demorest v. City Bank Co.*, 321 U. S. 36; *Maxwell v. Bugbee*, 250 U. S. 525.

The power of a state to regulate rights of inheritance includes the power to deny, absolutely, to all aliens any right to inherit, and this is conceded by appellant (Brief for Petitioner, p. 71), *Terrace v. Thompson*, 263 U. S. 197. Conversely, by virtue of this inherent

---

[16]The decision of this Court that the California statute is unconstitutional if coupled with a holding that the Treaty of 1923 no longer exists, would still leave the Custodian's right to take open to serious question, since the right of the aliens would have to be derived from the effect of the Trading with the Enemy Act in conjunction with Sections 27 and 1026 of the California Probate Code. Section 27, California Probate Code permits testamentary disposition only to "persons capable by law of taking the property".

power to regulate rights of succession and testamentary disposition, the state has the power to grant to all aliens an absolute, unlimited right to inherit property within its borders. In *Blythe v. Hinckley*, 180 U. S. 333 (1900), it was contended that such a grant of rights to aliens by state statute was, in the absence of a treaty on the subject, violative of Section 10, Article I of the Constitution of the United States, forbidding states from concluding treaties. This court characterized this contention as "extraordinary", and upheld the statute.

No less extraordinary is the assertion of appellant in the instant case that the granting, by the state, of a limited or conditional right of inheritance to aliens is, apart from any question of treaties, invalid and unconstitutional as an invasion of the federal control over foreign affairs. It is appellant's argument that the defect in the California statute lies in conditioning the alien's right to inherit on the extension of a similar privilege to American citizens by the alien's country. This condition he terms an "invitation" to foreign states to "trade" inheritance rights abroad for inheritance rights in California; and that, therefore, the statute attempts to duplicate the treaty making program of the federal government and is invalid as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights.

The California statute is not an isolated instance of state legislation in these terms. (See Appendices B and C, pp. vi-xiv.) Besides California, eight other states now have statutes conditioning rights of

inheritance of aliens on reciprocity.[17] Of these eight statutes, three antedate the California statute by a great many years.[18] The existence of these particular

---

[17] *Arizona*, Sec. 39-111, 3 Ariz. Code Annot. (1939); *Montana*, Sect. 2 Ch. 104, Laws of Montana (1939); *Nevada*, Sects. 9894, 9894.01, 9894.02, 2 Nev. Comp. Laws Supp. 1931-1941; *Oklahoma*, Title 60, Sect. 121, Okl. Stats. Ann. Perm. Ed. (cf Title 84, Sect. 229, Okl. Stats. 1941); *Oregon*, Sect. 61-107; 5 Ore. Comp. Laws Annot. (1940); *Texas*, Articles 167, 177, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1935); *Connecticut*, Sect. 5055, 2 Gen. Stats. Conn. (1930 Rev.); *Louisiana*, Article 1490, Civil Code (enacted 1825). These statutes are set forth in Appendix C, pp. x-xiv.

The history of such legislation in the State of New York is interesting, and indicative of the various facets of valid state policy on this question. Thus, prior to 1893, aliens were under the full common law disability as to rights in property in New York. In 1893, this disability was removed and aliens were given full rights, under conditions not here material (Ch. 207, p. 365, L. 1893). In 1897, this was modified to impose the requirement of reciprocity—the citizen of any other country that allowed the citizens of the State of New York to take, hold, and transfer real estate were given similar privileges in New York—(Ch. 593, p. 706, L. 1897). See: *Haley v. Sheridan*, 94 N.Y.S. 864 (1905). This rule of comity and reciprocity prevailed in New York until 1913, when Sect. 10, Subdiv. 2 of the Real Property Law (Ch. 152, 153, L. 1913) repealed the law of 1897 and provided that "alien friends" could take real property under the same rights as citizens. It was under this statute that *Techt v. Hughes*, supra, was decided. In 1944, this statute was amended to remove the limitation as to "alien friends", and now provides that all aliens may take real property in the same manner as native-born citizens. (See Sect. 10, Subdiv. 2, Real Property Law, 49 McKinney's Consol. Laws of N.Y. Annot. p. 11). The Code Commissioner's Note to this latest amendment to the New York law states that the amendment was designed to give control of property of aliens to the Alien Property Custodian. It is to be noted, then, that in this enactment is recognized the power of the state to *create* property rights in aliens, and then to create, *ipso facto*, a right to take the same in the Custodian.

[18] *Connecticut*, supra, note 17, enacted in 1918; *Texas*, supra, note 17, enacted in 1854; and *Louisiana*, Article 1490, Civil Code enacted as Article 1477 of the Civil Code of 1825. See: *Duke of Richmond v. Milne's Executors*, 17 La. 312, 36 Am. Dec. 613 (1841) in which this statute was applied and construed as between the laws of Scotland and Louisiana. The Louisiana statute was derived from the Code Napoleon of 1804.

statutes, especially the three mentioned in footnote 18, p. 58, and the further fact that very state of the union has some form of statutory enactment dealing with aliens' rights of inheritance (see Appendix B, pp. vi-ix, is a forceful indication that, traditionally, it had never been considered that any constitutional limitations whatever existed as to the power of the states to deny, grant, or condition the right of aliens to inherit.

Irving Trust Co. v. Day, supra;
Blythe v. Hinckley, supra.

The area of possible state action for any purpose does not include power to negotiate directly with foreign states.

United States v. Curtiss-Wright Corp., 299 U. S. 304.

It must be considered a novel, and startling, doctrine, however, to urge, as appellant has, that state action within a sphere uniquely and exclusively under state jurisdiction, and which action does not conflict with nor hinder federal action or policy in the field in question, namely, foreign affairs, is invalid merely because that state action has some incidental or indirect effect in foreign countries.[18] The question

[18]It is difficult to conceive of any state statute which does not, or could not have some indirect effect in foreign countries and hence upon our foreign relations. The effect of state workmen's compensation laws is a matter of deep concern to foreign countries, as the rights of foreign beneficiaries of American working men is an important part of the work of foreign consuls in this country. Also, state statutes regulating the hours of labor of women in industry has an indirect effect on foreign affairs as it enables cheap foreign labor to obtain a competitive advantage. This leads to the passage

here involved is to be distinguished from that wherein there is a conflict, either in principle, policy or essential details, between state action and federal action in a field in which both governments have the power to act. Where such occurs, the federal power must prevail. *Hines v. Davidowitz*, 312 U. S. 52. Here, in the instant case, no such conflict is found.

An argument very similar to that made by the Custodian here was made in *Mager v. Grima*, supra, where a state statute taxing the legacy of an alien at a higher rate than that of a citizen was in question. There the alien argued that since the proceeds of the legacy were sent out of the country the tax was a tax on exports and the matter was therefore within the exclusive province of the federal government. In passing on this argument the court said (8 Howard 490, at p. 494):

> "We can see no objection to such a tax, whether imposed on citizen and alien alike, or upon the latter exclusively. It certainly has no concern

---

of tariff acts by the federal government, and ultimately to negotiations for reciprocal trade agreements.

The operation of state statutes which express some state policy which, though valid, is not uniform throughout the United States, also has some effect in foreign countries. Thus, suppose a resident of California dies, leaving only community property. In his will he bequeaths a dollar to his wife, also resident of California, and the residuum to his parents, nationals of and resident in Italy. The wife invokes the provisions of California Probate Code, Section 201, and elects to take her community property interest rather than under the will (See: *Estate of McCarthy*, 127 Cal. App. 80). This election which would have the effect, under California law, of depriving the Italian legatees of half of their bequest, certainly has an effect in a foreign country. The validity of the law is beyond question, however.

with commerce, or with imports or exports. It has been suggested, indeed, in the argument, that, as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the tax was therefore a tax on exports. But if that argument were sound, no property would be liable to be taxed in a state, when the owner intended to convert it into money and send it abroad."

The Court also stated (8 Howard, at pp. 493-494):

"Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that the property so descending or bequeathed shall belong to the state. In many of the states of the Union at this day, real property devised to an alien is liable to escheat. *And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.*" (Emphasis added.)

In delineating the areas of permissible action, for both state and federal governments, within the limits of reciprocal constitutional guarantees of and inhibitions on the exercise of governmental power, a familiar doctrine is encountered, namely, that the exercise of a governmental power, which is otherwise clearly valid, will not be struck down merely because of some incidental effect beyond the direct power of the enacting government.

In re Kollock, 165 U. S. 526, 536 (1896):

Veazie Bank v. Fenno, 8 Wall. 533;
McCray v. United States, 195 U. S. 27;
Sonzinsky v. United States, 300 U. S. 506;
A. Couthoui, Inc. v. United States, 54 F. (2d) 158, cert. den. 285 U. S. 548;
United States v. Doremus, 249 U. S. 86;
Nigro v. United States, 276 U. S. 332;
Chas. C. Steward Mach. Co. v. Davis, 301 U. S. 548;
Helvering v. Davis, 301 U. S. 619;
Missouri v. Holland, 252 U. S. 416;
Florida v. Mellon, 273 U. S. 12.

While these decisions illustrate the power of the federal government to act within the scope of its delegated powers, despite a resultant, incidental effect upon fields of power reserved to the states, the principle is equally applicable to state power.

Gilbert v. Minnesota, 254 U. S. 325;
Kelly v. Washington, 302 U. S. 1, 10;
Halter v. Nebraska, 205 U. S. 34;
Reid v. Colorado, 187 U. S. 137;
Carey v. South Dakota, 250 U. S. 118;
Dickson v. Uhlmann Grain Co., 288 U. S. 188;
Mintz v. Baldwin, 289 U. S. 346;
Maurer v. Hamilton, 309 U. S. 598, 614;
Savage v. Jones, 225 U. S. 501.

The doctrine of federal supremacy naturally extends to federal action an inherently greater freedom in reaching into forbidden fields as the incidental result of a valid enactment, since the state field must give way to the federal end to be reached thereby. *Northern*

Securities Company v. United States, 193 U. S. 197. The only significance of federal supremacy, however, in an area where a valid federal statute reaches, indirectly, into a state field, is that, in the event of any conflict between the two, the fact of conflict adds nothing to the principle applied. In the reverse situation, however, that of valid state action with indirect effect in a field of federal power, the existence of conflict is all important, as that is the controlling factor which determines the ultimate validity of the state action.

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together * * *"
>
> *Sinnot v. Davenport*, 22 How. (63 U. S.) 227, 243 (1859);
>
> *Kelly v. Washington*, 302 U. S. 1, 10 (1937).

These doctrines can be employed significantly in the case at bar. The cases cited above, dealing with the validity of state statutes despite an incidental effect in fields delegated to the federal government, were largely cases dealing with the efforts of the states to advance some local policy under the state's police power, but which had an incidental effect on interstate commerce. The effect of state action touched on commerce, and there was an absence of conflict with any federal statute or federal policy; the state action was upheld. Where, however, state action infringed

upon *personal freedom* in a field reserved to the federal government, this court has drawn the line and refused to validate that area of state action. Even though the court spoke in terms of "commerce", it was the infringement upon the personal freedom of the subjects of the legislation in issue, and the more vivid implications of such action which prompted this court to limit state power.

Henderson v. Mayor of New York, 92 U. S. 259;
Chy Lung v. Freeman, 92 U. S. 275;
People v. Compagnie General Transatlantique, 107 U. S. 59;
Edwards v. California, 314 U. S. 160 (1941).

It is this which distinguishes the case of *Hines v. Davidowitz*, 312 U. S. 52, from the situation now before the court. The language of the court in that case, as cited by appellant (Brief for Petitioner, pp. 71-72) is quite persuasive as to the position espoused by appellant only when removed from its context and divorced from the facts of the case. *Hines v. Davidowitz* is distinguished from the instant case because, in particulars, the state act regulated the personal freedom of aliens who were the subject of the legislation,[20] and further, and most significant on the issue of the incidental effect of state action on foreign affairs, the state statute violated the policy which Congress has attempted to follow in the federal statute, and there was a resultant *conflict* between the policies

[20] "• • • it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans". 312 U.S. at 68.

of the two statutes. Thus, the Pennsylvania statute required the alien registrants to carry identification cards, which were required to be shown to all police officers upon demand, or prior to obtaining a vehicle or driver's license. The federal statute, however, merely required registration, but not the carrying of identification cards; nor was this a mere technical difference between the two statutes—it was part of a scheme of Congressional policy, which included provisions that the information obtained through registration of aliens was to be kept secret and not revealed except to governmental agencies upon consent of the commissioner and the Attorney-General. (312 U. S. at 73.) This Congressional policy, then, was, in the words of the court, to register aliens, but otherwise "to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against". (312 U. S. at 74.) In short, the Pennsylvania law exceeded the permissible area of state action because (1) it affected the personal freedom of the subjects, who were especially within federal jurisdiction, and (2) it conflicted radically with the policy sought to be engendered by the federal statute. On a broader ground, the decision restricted this area to the federal government, but did not leave the field with no government able to legislate within it.

It would appear, then, that the instant case more nearly approaches that category of cases which deal

with state tax statutes or state food laws or cattle disease laws, to which Mr. Justice Black adverted in *Hines v. Davidowitz,* as being distinct from the situation therein presented; for, here we have no question of an infringement upon personal freedoms, but merely a regulation of inheritance rights, a purely statutory privilege which has always been held to be a matter for exclusive state regulation. Further, there is here no conflict at all with either federal policy or federal statute. If the treaty in question is valid and subsisting, the California statute implements and executes it. *In re Bevilacqua's Estate,* Cal. App. (2d), 161 P. (2d) 589 (1945). That there is no federal policy against reciprocity of inheritance rights is amply evidenced by the imposing array of treaties providing for the same given to us by appellant. (Brief for Petitioner, pp. 93-94.) Further evidence that there is no federal policy violated in allowing the *states* to determine that the rights of aliens to inherit property shall be based on a unitary basis rather than on a national, uniform basis, is to be found in the fact that two treaties, still in force, provide, in effect, that reciprocity shall exist only as to those states, which, in turn, grant it to the citizens of the foreign countries signatory thereto—an invitation by our State Department to the various states to enact statutes of the very sort in issue here.[21] In the absence of an

[21] Thus, Article VII of the Treaty of February 23, 1853 with France (10 Stats. 992, 996), provides:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens

actual conflict between state action and any federal action or policy, authorities which nullify state action on that ground are not in point. *Hines v. Davidowitz*, supra; *United States v. Belmont*, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203.

One very important factor which must be considered along with the distinctions above made, is that the exercise of power by the state in the type of case now before the Court is one exclusively and

---

of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States, the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens."

It was this Treaty which led Connecticut to enact its reciprocal inheritance statute, in 1918, Sect. 5055, 2 Gen. Stats. Conn. (1930 Rev.), which reads as follows:

"Any alien resident in the United States, and any citizen of France, so long as France shall accord the same right to citizens of the United States, may purchase, hold, inherit or transmit real estate in this state in as full a manner as native-born citizens * * *"

See also Treaty of Nov. 13, 1937 with Siam (53 Stat. 1731) Article I of which contains substantially the same provision as the Treaty of 1853 with France, above.

It is interesting to note, further, that the Congress has provided for the operation of its Mineral Leasing Act of February 25, 1920 as to aliens to proceed on the basis of a finding of reciprocity. See: 30 U.S.C.A. Sect. 181, 41 Stat. 437; see also 38 Op. Atty. Gen. of U.S. p. 476, (1936), a finding of reciprocity without reference to treaties.

uniquely within the power of the state. To deny to the states the power to condition inheritances in the manner in issue, is to deny the very existence of any power to so condition inheritance. It is, further, to import that the mere invitation, if any is present, to reciprocate is equivalent to direct negotiation, to a coercion of the foreign country.

> "But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible."
>
> Justice Cardozo, in *Steward Machine Co. v. Davis*, 301 U. S. 548 (1936), at p. 589.

The issue is whether the exercise of an exclusive state power must fall because of an incidental effect upon a federal power, and which incidental effect is in no way repugnant to, nor conflicts with the federal power. The fundamental issue before this court is whether a new constitutional limitation is to be created and applied to a province of residual state power, with no corresponding enlargement of federal power or freedom of action in the domain claimed to have been invaded. In short, no valid constitutional basis exists for the proposed foray into state power. The result of such a limitation, if created by this court, would be to deprive the states of the full exercise of a power which no other government possesses, and this without any corresponding enlargement of federal power, which is already, concededly, plenary and unlimited in its own field.

Although state statutes of the nature of the one here in question date back as far as 1825 (see footnote 18, p. 58, supra) the appellant has cited no case in his argument (Petitioner's Brief, pp. 68-75) and we submit none can be found, where the power of the states to pass laws regulating and limiting or even abolishing the rights of aliens to inherit is denied in the absence of treaty provisions. Instead the courts have universally recognized that it is a field of exclusive state power. No urgent reason is apparent why the court should apply a different rule in this case from that which has been applied in so many cases heretofore in our nation's history.

III. THE CUSTODIAN HAS ALWAYS HAD THE BURDEN OF PROOF IN THIS CASE.

The essential element of the statutory amendment to Sections 259, 259.1 and 259.2 of the California Probate Code (see Appendix A, pp. i-iv) in 1945 (Ch. 1160, Calif. Stats.) aside from incorporating the entire statute into one code section (Probate Code Section 259, 1945), was to change the allocation of the burden of proof on the issue of reciprocity of rights of inheritance or succession, from the alien, as the 1941 enactment had provided, to the resident claimant.[22] This was done in the following language (Probate Code Section 259, 1945):

---

[22]Senate Bill No. 115, California legislature, reported on by Senate Judiciary Committee with a "do pass" recommendation on March 26, 1947, restores the statute to its original form. (For text of bill see Appendix A, p. iv, infra.)

"It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories, a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the non-existence of such reciprocal right or rights shall be upon the petitioner."

Appellant contends that the court below erred in holding that, despite this amendment, which occurred after trial of this cause, but pending appeal, the Custodian had the burden of proof on the issue of reciprocity. (R. 40.) Initially, it is quite apparent that the court below applied the statute as it read *prior* to amendment, throughout its deliberations. Recurring throughout the opinion of the court below are references to "Sections 259, 259.1 and 259.2" (See R. pp. 32, note 5, 33, 34, 39), and only by way of distinction is there reference to Section 259, 1945. (R. 40.)

Appellant contends that the decision of the lower court, in holding that the Custodian retained the burden of proof which had rested upon him throughout the trial of this issue, is error and contrary to the California cases, which, appellant concedes, must govern on this point. (Brief for Petitioner, p. 76.) As to the alleged failure of the Circuit Court of Ap-

peals to follow the California decisions, it may be noted in passing that all of the authority which appellant cited to the court below as sustaining his position, and which authority was cited to this court in appellant's petition for writ of certiorari, page 20, footnote 9 thereto, has now been entirely abandoned by appellant.

The California rule as to the effect of a change in law pending appeal, and which rule the court below followed, is set forth most cogently in the case of *Vanderbilt v. All Persons*, 163 Cal. 507 (1912).[23] In this case, an action to quiet title, the plaintiff offered into evidence, and it was received, an abstract of title made up and certified after the public records had been destroyed by fire. As of the time of this trial, Section 1855a of the California Code of Civil Procedure did not permit such abstracts to be admitted into evidence. After trial and pending appeal by the defendant in the case, Section 1855a was amended to permit the introduction of such evidence. In the appellate court the plaintiff argued that the error of receiving his abstract into evidence was now cured, since subsequent to the trial the amendment of the statute permitted that very procedure. The California Supreme Court held that the new law did *not* govern on the appeal, saying (163 Cal. at 512):

> "But conceding that now the policy of the law is to admit abstracts in evidence in the court below, does that justify the court in affirming a judgment supported by evidence erroneously ad-

[23] Cited in Brief for Petitioner, p. 80.

mitted at the time of trial? Section 1855a does not in terms, at least, assume any retroactive effect, and while it marks a change in legislative policy, it contains no express authority for this court to apply that amended policy to pending appeals. Appellant, relying upon the plain terms of the section as it existed at the time of the trial, may have omitted to put in all of the proofs of its asserted title. For aught we know, it may be in possession of other evidence which would have been introduced if the cause had been tried upon the rule which now prevails."

Accord:

Barnaby v. Barnaby, 100 Cal. App. 195 (1929);

Morris v. Board of Education, 119 Cal. App. 750;

Lowery v. Hallett, 105 Cal. App. 84, doctrine aff'd in California Supreme Court in *Krause v. Rarity,* 285 P. 879 (1930);

Ex parte Sparks, 120 Cal. 395 (1895).

See:

Ankeny v. Clark, 148 U. S. 345 (1892).

Barnaby v. Barnaby, supra, is precisely in point with the issue of this case. The action was to recover unpaid alimony based on a divorce decree of a sister state, and the issue was whether this decree had the force and effect of a judgment for the payment of money. The plaintiff failed to put in any evidence, beyond the mere allegation, as to the law of the sister state. The California Code was amended *subsequent* to judgment for the plaintiff and after appeal had

been perfected; (the same situation as in the instant case) the amendment allowed California courts to take judicial notice of the laws of sister states. It was held, on appeal, that this amendment could *not* affect the appeal, and a reversal was ordered because the plaintiff had failed to put in evidence on the issue. In the *Barnaby Case,* thus, the plaintiff failed to meet the original procedural requirements of producing evidence on the issue, and was not saved by a subsequent change in procedure which would have obviated the need of producing such evidence at the trial, had the rule existed in her favor at that time. This situation is analogous to the present case, in which the appellant failed to meet the burden of producing evidence as required at the time of trial, and now, upon a subsequent change in the law governing such procedure, hopes to profit on appeal by a defect in the record of his own doing.

There is no conflict in the California cases on this point. The rule in California follows that stated by Sutherland:

> "If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is manifested." 2 Sutherland on Statutory Construction (2d Ed.) Section 674.

In short, changes of procedural law, in California, cannot affect steps in the case which have already been completed or passed. The California cases cited by appellant are all, without exception, distinguishable from the situation in this case, in that in each one of them, the change in law occurred *before* the step in the case which was thus affected had been reached. In the case now before this court, the change in law had occurred *after* the step affected, namely the introduction of evidence at the trial, had been passed. The court below did not err under California law, in holding that the Custodian had failed to meet the burden of proof which was upon him.

CONCLUSION.

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Dated, Richmond, California,
April 2, 1947.

Respectfully submitted,

JOSEPH WAHRHAFTIG,
S. C. MASTERSON,
Attorneys for Respondents.

MATT WAHRHAFTIG,
JOSEPH GENSER,
Of Counsel.

(Appendicies A, B and C Follow.)

Appendix A

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the pay-

ment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

California Probate Code, Sections 259, 259.1, 259.2, Stats. 1941, c. 895.

259. *Rights of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estate of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee, or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the

hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

SENATE BILL No. 115

Introduced by Senator DeLap
January 14, 1947

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Section 259 of, and to add Sections 259.1 and 259.2 to, the Probate Code, relating to inheritance rights of aliens.

The people of the State of California do enact as follows:

SECTION 1. Section 259 of the Probate Code is amended to read:

259. The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. ~~It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do~~

~~not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.~~

SEC. 2. Section 259.1 is added to the Probate Code, to read:

259.1 The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

SEC. 3. Section 259.2 is added to the Probate Code, to read:

259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Reported out by Senate Judiciary Committee
March 26, 1947 with a "Do Pass" recommendation.

INSERT

Section 5 (b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U.S.C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Appendix B

STATE STATUTES ON INHERITANCE RIGHTS OF ALIENS.

State	Citation	Provisions
Alabama	Title 47, Sect. 1 Code of Alabama, 1940	Alien, resident or non-resident may take, hold, etc., same as a native citizen (originally enacted 1875)
*Arizona	Sect. 39-111, 3 Ariz. Code Annot., (1939)	Aliens "eligible to citizenship" may take and hold if reciprocity exists; if treaties do not forbid, aliens have 5 years to become citizens and hold realty
Arkansas	§ 272, Pope's Dig. of Stats. of Ark. (1937)	Same as citizens
*California	Section 259, Probate Code	Reciprocity required; burden of proof on local claimant
Colorado	Ch. 7, Sect. 6, 1935 Colo. Stats. Annot.	Same as citizens
*Connecticut	Sect. 5055, 2 Gen. Stats. Conn. (1930 Revision)	Alien residents have same rights as citizens, and citizens of France same if France gives right to U. S. citizens. (orig. 1918)
Delaware	Sect. 3655, Rev. Code of Delaware (1935)	Same as citizens
District of Columbia	Sect. 45-1502, D. C. Code	Aliens can't own realty except by inheritance, unless treaties permit it
Florida	Sect. 731.28, 1 Stats. 1941	Same as citizens
Georgia	§ 79-303, Code of Ga. (1933)	Friendly aliens same as citizens
Idaho	Sect. 14-116, 14-117 Idaho Code Annot. (1943)	Resident aliens same as citizens non-resident aliens have 2 years t claim; escheat to state if no clai
Illinois	Sect. 1 & 2, Ch. 6 Ill. Rev. Stats. (1943)	Same as citizens, but can hol realty for 6 years only

State	Citation	Provisions
Indiana	Sect. 56-504, 56-505 Burns Ind. Stats. Annot. (1933)	All aliens take same as citizens; if realty exceeds 320 acres, alien must dispose of excess within 5 years or excess escheats
Iowa	Sect. 567.1 II Code of Iowa (1946)	Alien can take up to 320 acres; non-resident widow or heirs of alien or citizen can hold realty only for 20 years
Kansas	Sect. 59-511, Gen. Stats. 1943 Supplement	Aliens "eligible to citizenship" take same as citizen; all others as provided in treaties (enacted 1925)
Kentucky	Sect. 381.330, 381.340 Kentucky Rev. Stats. (1942)	Non-resident alien may take and hold realty for 8 years; his heirs get only balance of this term
*Louisiana	Article 1490, Civil Code	Aliens may take by will or by gift only if reciprocity exists (enacted 1825)
Maine	Title 87, Sect. 2, Code of Me.	Friendly aliens, same as citizens
Maryland	Title 3, Sect. 1, Code of Md.	Friendly aliens, same as citizens
Massachusetts	Sect. 1, Ch. 184, vol. 6 Annot. Laws of Mass.	Same as citizens
Michigan	§ 13493, Compiled Laws (1929)	Same as citizens
Minnesota	Sect. 500.22, Laws (1945)	Aliens may own only up to 90,000 square feet of land unless they took by devise or inheritance
Mississippi	Sect. 84, Constitution Section 842, Land and Conveyances, Miss. Code Annot.	Resident aliens, same as citizens; non-resident aliens, absolutely prohibited except may hold for 20 years as security
Missouri	Sect. 15228, Laws	Same as citizens
*Montana	Ch. 104, Sect. 2, Laws of Montana, 1939	Reciprocity required
Nebraska	Sects. 76-402, 76-403, 76-405, Rev. Stats. 1943	Aliens can't own land; widows and heirs have 10 years to sell; resident aliens have 5 years after taking by devise or descent

State	Citation	Provisions
*Nevada	Sections 9894, 9894.01, 9894.02 2 Nev. Comp. Laws Supp. 1931-1941	Reciprocity required; burden of proof on alien; escheat to state if no local heirs and non-reciprocity found
New Hampshire	§ 213-19, Code of N. H.	Resident aliens, same as citizens
New Jersey	Sect. 46:3-18 Rev. Stats. 1937	"Alien friends" same as citizens; either state or federal government may seize realty during war
New Mexico	Sect. 75-121, New Mex. Stats. Annot. 1941	Same as citizens
New York	Sect. 10, Subdiv. 2 Real Prop. Law	Aliens same as citizens. (1944 amendment omitted alien "friends"; designed to give control to Alien Property Custodian in cases of alien enemies)
North Carolina	Sect. 64-1 Gen. Stats. 1943	Same as citizens
North Dakota	Sect. 56-0116 No. Dak. Rev. Code of 1943	Same as citizens
Ohio	Sect. 10503-13, Throckmorton's Ohio Code Annot. (1940)	Same as citizens
*Oklahoma	Title 60, Sect. 121, Stats. (1941) Cf. Title 84 Sect. 229	May hold land for five years but reciprocity as to personalty
*Oregon	Sect. 61-107, 5 Ore. Compl. Laws Annot. (1940)	Reciprocity required; escheat if no eligible heirs
Pennsylvania	Title 68, Sects. 22, 24, Purdon's Penn. Stats. (1936)	Same as citizens, except for alien enemies
Rhode Island	Sect. 1, Ch. 432, Gen. Laws (1938)	Same as citizens
South Carolina	Sect. 8907, Code of Laws (1942)	Same as citizens
South Dakota	Sect. 56.0120, Code of 1939	Same as citizens

State	Citation	Provisions
Tennessee	Sect. 7187, 7189, Williams Tenn. Code Annot. (1934)	Same as citizens
*Texas	Articles 167, 177, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1935)	Reciprocity required as to personalty; aliens cannot own realty unless reciprocity exists (1854)
Utah	Sect. 101-4-24, Utah Code Annot. (1943)	Same as citizens
Vermont	No. statute; 25 Vt. 433	Friendly aliens may inherit
Virginia	Sect. 66, Virginia Code of 1936 Annot.	Aliens, not enemies, same as citizens
Washington	Sect. 10584, Remington's Rev. Stats. Annot. (1940 Supp.)	Aliens can inherit and hold for 16 years
West Virginia	Sect. 3541, Code of 1943	Same as citizens
Wisconsin	Sects. 234.22, 234.23, Stats. (1943)	Resident aliens, same as citizens; non-resident aliens limited to 320 acres
Wyoming	Sect. 88-4004, Rev. Stats. (1931)	Aliens, if direct heirs, may take same as citizens

*States having reciprocity inheritance statutes.

Appendix C

Reciprocal Inheritance Statutes of States Other Than California

Arizona—3 Ariz. Code Annotated (1939)

§ 39-111, *Estate of aliens*—In making title to real property by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or has been an alien; and every alien eligible to citizenship to whom any real property may be devised or may descend, shall have five (5) years to become a citizen of the State and take possession of such property, or shall have five (5) years to sell the same before it shall be declared forfeited, or shall escheat to the State; provided that the treaties of the United States with the nation to which such alien may belong do not otherwise direct; and, provided, further, that aliens eligible to citizenship may take and hold any property, real or personal, in this State, by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal property by devise or descent within the country of such alien.

* * * * * * *

Montana, Laws of Montana (1939)

Chapter 104, *Section 2*. No person shall receive money or property, save and except mining property, as provided in Section Twenty-five, Article III, of the Constitution of the State of Montana, as an heir, devisee and/or legatee of a deceased person leaving an

estate or portion thereof in the State of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

Approved March 3, 1939

* * * * * * *

Nevada, 2 Nev. Comp. Laws, Supp. 1931-1941

Section 9894. Inheritance Rights of Aliens, § 1. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by descent or inheritance, either under the terms of wills or in cases of intestacy, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories moneys originating from the estates of persons dying within such foreign countries.

§ 9894.01 Burden of Proof. § 2. In the cases described in section 1 of this act the burden of proof shall be upon the alien claimant to establish that said reciprocal right to take and said right to receive exist.

§ 9894.02 When Property Escheats. § 3. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the State of Nevada as provided by law in those cases where a person shall die intestate without heirs.

[Sec. 4.] This act shall be in force and effect immediately upon its passage and approval.

(Approved March 28, 1941)

* * * * * * *

Oregon, 5 Ore. Comp. Laws Ann. (1940)

Section 61.107. Right of non-resident aliens to take personal property by descent or inheritance: Escheat. The right of aliens not residing within the United States or its territories, to take personal property or the proceeds thereof in this state by descent or inheritance, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property or the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens, and upon the right of citizens of the United States to receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the State of Oregon, as provided by law in those cases where a person shall die intestate without heirs. [L 1937, ch. 399, § 1, p. 607]

* * * * * * *

Texas, 1 Vernon's Ann. Rev. Civ. Stats. of Texas (1937)

Article 177: Aliens shall have and enjoy in this State such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong or by the treaties by such nation with the United States.

Article 167. This title shall not apply * * * to the following (who are or shall become residents) * * *

4. Aliens who are citizens or subjects of a nation which now permits citizens of this State to own land in fee in such country.

* * * * * * *

Connecticut, (1918) 2 Gen. Stats. Conn. (1930 Rev.) *§ 5055.* Any alien resident in the United States, and any citizen of France, so long as France shall accord the same right to citizens of the United States, may purchase, hold, inherit or transmit real estate in this state in as full a manner as native-born citizens (x)

> "Attention is called to the fact that there are now treaties with other countries than France conferring rights upon their citizens to hold real estate."

* * * * * * *

Oklahoma Reciprocal Statute—reciprocity as to personalty § 121, Title 60, Statutes (1941):

"No alien or any person who is not a citizen of the United States shall acquire title to or own land in the State of Oklahoma, except as hereinafter provided,

(x) Note to Statute (in statute book).

but he shall have and enjoy in the State of Oklahoma such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this Act or the Constitution of this State." (Enacted 1910)

* * * * * * *

Louisiana. Article 1490, Civil Code, La. Donations inter vivos and mortis causa may be made in favor of a stranger when the laws of his country do not prohibit similar disposition from being made in favor of a citizen of this State.

IN THE

Supreme Court of the United States

October Term, 1946.

No. 620.

TOM C. CLARK, ATTORNEY GENERAL, as successor to the Alien Property Custodian,

Petitioner,

vs.

ALFONSA ALLEN, GUELFO DE DOMINICIS, ULDEN PAGOZZI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' BRIEF.

FRED N. HOWSER,

Attorney General of the State of California,

EVERETT W. MATTOON,

Deputy Attorney General of the State of California,

600 State Building, Los Angeles 12, California,

Amici Curiae.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206

SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	2
Prefatory statement	2
Treaty and statutes involved	3
Summary of argument	3
Argument	8
I.	
Article IV of the Treaty of 1923 with Germany does not control in this case	8
II.	
Article IV of the Treaty of 1923 does not govern succession by German nationals to personal property of decedent Americans	14
III.	
The California statute is valid and does not invade the federal field of control over foreign relations	18
IV.	
The burden of proof of the existence of reciprocal rights is upon the custodian	22
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES PAGE

Barnaby v. Barnaby, 100 Cal. App. 195 24
Cummings v. Deutsche Bank, 300 U. S. 115 ..... 5, 10, 11
Duus v. Brown, 245 U. S. 176 17
Frederickson v. Louisiana, 23 How. 445 ..... 16, 17
Hines v. Davidowitz, 312 U. S. 52 ..... 7, 20
Irving Trust Co. v. Day, 314 U. S. 556 ..... 4, 18, 20
Lyeth v. Hoey, 305 U. S. 188 19
Peterson v. Iowa, 245 U. S. 170 17
Skarderud v. Tax Commission, 245 U. S. 633 17
Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 21 U. S. 464 9
Sophie Rickmers, The, 45 F. (2d) 413 9
Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185; cert. den. 254 U. S. 643 ..... 8, 9, 10, 11, 12
Terrace v. Thompson, 263 U. S. 197 19
Vanderbilt v. All Persons, 163 Cal. 507 23

STATUTES

Acts of Louisiana (1855), Act 315, Sec. 315, pp. 398, 399 17
California Code of Civil Procedure, Sec. 1855a 23
California Probate Code, Sec. 259 (Stats. 1941, Chap. 895) 3, 22, 24
California Probate Code, Sec. 259.1 (Stats. 1941, Chap. 895) 3, 22
California Probate Code, Sec. 259.2 (Stats. 1941, Chap. 895) 3, 22
California Probate Code, Sec. 259.2 (Stats. 1941, Chap. 895, p. 2135) 2, 3
California Probate Code, Sec. 259 (Stats. 1945, Chap. 1160) 3
California Statutes of 1945, Chap. 1160 22

PAGE

Joint Resolution of Congress, July 2, 1921 (42 Stat. 105, 106)..... 6, 11

Trading With the Enemy Act, Sec. 5(b), as amended by Sec. 301, Title III, First War Powers Act, 1941 (55 Stat. 839).... 3

Treaty of Berlin of 1921..... 6

Treaty of Friendship, Commerce and Consular Rights, Art. IV, signed Dec. 8, 1923, proclaimed Oct. 14, 1925 (44 Stat. 2132, 2135)..... 3

Treaty of 1783 With Sweden, Art. VI, (8 Stat. 346, 354)..... 17

Treaty of 1826 With Denmark, Art. VII (8 Stat. 340, 342).... 17

Treaty of 1827 With Norway, Art. XVII (8 Stat. 346, 354).... 17

Treaty of 1844 With Wurtemburg (8 Stat. 588, 590)..... 16

Treaty of 1899 With Great Britain (31 Stat. 1939)..... 17

Treaty of 1923 With Germany, Art. IV.....2, 5, 6, 8, 14, 17, 18

Treaty of 1928 With Prussia (8 Stat. 378, 384)..... 11

TEXTBOOK.

Hackworth, Digest of International Law (1943), VI., p. 327..... 11

INDEX TO APPENDICES.

PAGE

Appendix A. Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2135 1

Appendix B. Section 259, 259.1 and 259.2 of the California Probate Code, as enacted by Chapter 895, California Statutes of 1941, effective July 1, 1941 2

Appendix C. Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945 3

Appendix D. Section 5(b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C., App., Supp. V, 5(b) 4

IN THE

Supreme Court of the United States

October Term, 1946.

No. 626.

TOM C. CLARK, ATTORNEY GENERAL, as successor to the Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, *et al.*,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS' BRIEF.

Opinions Below.

The opinion of the District Court [R. 15-21] is reported in 52 F. Supp. 650. The opinion of the Circuit Court of Appeals [R. 29-40] is reported in 156 F. (2d) 653.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 22, 1946 [R. 41]. A petition for amendment of the opinion was denied by an order entered on July 17, 1946 [R. 41]. On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was

granted on December 9, 1946 [R. 42]. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether Article IV of the Treaty of 1923 with Germany is controlling in this case, or whether by reason of the declaration of war with Germany and the provisions and employment of the Trading with the Enemy Act, as amended by the First War Power Act and implemented by Executive orders and rulings, any rights exist in the foreign heirs.

2. Whether, assuming the Treaty of 1923 was operative at the time of decedent's death, Article IV thereof governs succession by German nationals to personal property of decedent Americans.

3. Whether the California Statute is valid, apart from the treaty, and not subject to the charge that it invades the Federal field of control over foreign relations.

4. Whether the burden of proof as to reciprocal inheritance rights rests upon the Custodian.

Prefatory Statement.

The State of California has a real and substantial interest in the decision of the questions here presented. Not only is it interested in maintaining the integrity of its laws—it is also interested for the reason that in the event no reciprocal rights are found to exist, either as a result of the treaty or otherwise, and in those cases where there are no heirs or legatees resident here to take, the property would be disposed of as escheated property. (Sec. 259.2, California Probate Code, Stats. 1941, Ch. 895, p. 2135.) [Appendix B, hereto, p. 2.]

Treaty and Statutes Involved.

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925 (44 Stat. 2132, 2135). Sections 259, 259.1 and 259.2 of the California Probate Code (California Statutes 1941, Chapter 895) and Section 259 of said code, as amended (California Statutes 1945, Chapter 1160, effective September 15, 1945). Section 5(b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941 (55 Stat. 839). These are printed in the Appendix hereto, pp. 1 to 4.

Summary of Argument.

The question here is whether the Alien Property Custodian[1] acquired anything when he vested whatever right, title and interest the German nationals named as beneficiaries in the will of decedent may have. Briefly stated it is —was there anything to vest? Neither the respondents nor the state have ever disputed the power of the Custodian under the Trading with the Enemy Act, as amended and implemented, to seize or vest the property of alien nationals in times of war or other emergency.

The state neither claims nor exercises any power over international affairs or foreign relationships. And that the war powers of the Federal Government, including the power to capture enemy property in time of war, are exclusive has never been questioned in any way. There is no controversy over these matters—but there *is* a divergence of view as to whether any property exists

---

[1]Hereinafter the Alien Property Custodian will be referred to as the "Custodian," the resident heirs as "Respondents" and the *Amicus Curiae* as the "State."

in this case which is subject to the exercise of these powers.

Here a resident of California died leaving her property, situate in that state, to four heirs-at-law, all residents and nationals of Germany. Before property thereby came into being which was subject to seizure or vesting the testator must have had the right to so dispose and the legatees to inherit or take. This depended in the first instance upon whether such rights were vouchsafed by treaty between this nation and Germany, and in turn whether if there was such a treaty it was effective at the time of her death. In the absence of any operative treaty provision—which would admittedly constitute the supreme law of the land—this depended in the second instance upon whether under the laws of California the property could so pass, and this in turn upon whether the laws of that state are free from offense to the Federal Constitution.

It is our position that the California statute, legislating in a field where it admittedly can "limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction,"[2] has validly denied the right to nonresident aliens to inherit property in that state in the absence of the existence of reciprocal rights to American citizens in the country of the alien's residence, and that this statute is fully operative, not being in conflict with any treaty in effect at the date of death of the decedent here, and not infringing upon the field of foreign affairs reserved to the Federal Government.

---

[2] *Irving Trust Co. v. Day*, 314 U. S. 556, 562.

I.

It does not become necessary to declare a wholesale abrogation of the Treaty of 1923 with Germany as a result of the declaration and state of war with that nation prior to and at the time of the death of decedent. However, by the acts of Congress and those of other departments of the Federal Government, which were in direct and positive conflict with the provisions of Article IV of that treaty, these provisions were rendered wholly inoperative and without effect. It is futile to say that these provisions may be considered as having enjoyed continued existence during the war, as being "compatible with the state of hostilities." Not only were the agents of the Government empowered to seize all property of German subjects, this Court has held that upon such seizure the alien enemy owners were divested of every right, and the title acquired by the United States was absolute.[3] Any leniency or forbearance was rendered solely a matter of grace, not of right. The First War Powers Act of 1941, amending the Trading with the Enemy Act, conferred such broad powers and so implemented the seizure of property of foreign nationals that it is impossible to reconcile it with a purpose to give further recognition to such rights as were set forth in the treaty. To say that Congress did not, by specific mention of the treaty, express an avowed intent to repudiate it is not enough. Actions speak louder than words. The political action of this nation and a continued recognition of the treaty became wholly inconsistent and irreconcilable. The two were incompatible. Furthermore, the treatment accorded

---

[3] *Cummings v. Deutsche Bank*, 300 U. S. 115, 120.

the subject of reciprocal inheritance rights after World War I, preceding which the Treaty with Prussia had contained practically the same provisions as the Treaty of 1923,[4] convincingly demonstrate that the parties to the Treaty of 1923 held no illusions that its almost identical provisions would remain effective or control in the event of another war.

II.

The plain language of paragraph two of Article IV of the Treaty, relating to "personal property of every kind within the territories of the other," confers the right upon a national to dispose of his personal property situate in the country of the other nation, and any of his heirs or legatees may succeed thereto, but no right is given to heirs or legatees who are nationals of the nation of which the person disposing of his personal property is *not* a national to take personal property in the nation of which such person *is* a national. Thus complete reciprocity of inheritance rights is not conferred.

III.

The California statute is not subject to the charge that it invades the exclusively Federal field of control over foreign relations. It is purely and simply an inheritance statute, prescribing rules as to the circumstances under which aliens not residing within the United States may take property in California by succession or testamentary disposition. This Court has held that a state may limit, condition or abolish this right altogether. It has never

---

[4] Joint Resolution of Congress of July 2, 1921 (40 Stat. 106) and Treaty of Berlin of 1921 ratifying the same.

been disputed that this right is subordinate to the treaty-making power of the Federal Government. The California statute, by making reciprocal rights of inheritance its base, predicates its rule upon the treaty provisions made by the Federal Government. As the Federal Government claims no right, apart from the treaty-making power, to legislate for the states on this subject, there is no other way in which this can be regulated. No trespass in the field of foreign relations results. The situation is entirely different from that where both Federal and state governments have concurrent powers to legislate upon a subject.[5] In such a case, where the Federal Government occupies the entire field or where the state statute violates a policy promulgated by Congress, the state statute must yield. Here the state statute defers to and recognizes all treaty provisions, as it must. To say that the state indirectly becomes a seeker for corresponding rights among other nations is to attempt to impute an unwarranted and unduly strained motive and effect to the exercise of what has been consistently recognized as the state's legislative power.

IV.

As for the change in the burden of proof which the amended statute of 1945 prescribed, neither was the amendment in question entirely procedural, as distinguished from one affecting substantive rights, so as to render applicable the rule contended for by petitioner, nor does the present status of the instant case permit of its being invoked at this stage.

---

[5] *Cf. Hines v. Davidowitz*, 312 U. S. 52.

ARGUMENT.

I.

Article IV of the Treaty of 1923 With Germany Does Not Control in This Case.

Petitioner bases his primary reliance upon the claim that the Treaty of 1923 with Germany remained in effect after the outbreak of war, and was operative on the date of death of the testatrix in this case, viz., June 6, 1942. If it did, the designated legatees, resident in and nationals of Germany, would benefit by whatever rights were therein conferred and the Custodian, standing in their shoes, would take whatever interest they acquire. It is the contention of the respondents and the State that the decision of the Circuit Court was sound and that Article IV of the treaty had been shorn of all vitality and was entirely without effect on the date in question.

We think it unnecessary to explore at length the highly speculative field of the effect of war upon treaties. The subject has been treated extensively in both the brief of petitioner and that of the respondents. It was well stated by Judge Cardozo in a case[6] repeatedly referred to by petitioner that "The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law." He also said that "No one can study the vague and wavering statements of treaties and decision in this field of international law with any feeling of assurance at the end and that he has chosen the right path." Some writers have expressed the view that war of necessity annuls and terminates all treaties, others that war obliter-

---

[6] *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185, at 191, 193, certiorari denied 254 U. S. 643.

ates none, still others that war suspends their operation. As to such matters as rules for conduct during a war and international boundaries it may be said that they survive the outbreak of war. A generally accepted view is that war does not abrogate a treaty in its entirety, but only those portions which are incompatible with a state of war.[7] It would be wellnigh impossible to collate, and attempt to reconcile the varying expressions upon this subject. Of this, however, we are all aware—that the last World War was *total* war, and it must be realistically acknowledged that it penetrated every field of human conduct and activity. We cannot ignore the very real effect it had on treaties entered into during a time of peace.

Petitioner lays great stress upon the scholarly opinion of Judge Cardozo in *Techt v. Hughes* (1920), 229 N. Y. 222, 128 N. E. 185, certiorari denied 254 U. S. 643. The case is well-known and has been analyzed in the briefs of both petitioner and respondent. What the decision did was to allow inheritance by a resident of this nation who had married a citizen of Autria-Hungary (resident in the United States), thereby losing her citizenship here. She was loyal, peaceful and as an "enemy" alien she in no way jeopardized our country's war effort. Thus a serious hardship to an American woman, resident here, who had changed her nationality by marriage was prevented. However, the opinion then proceeded to express dictum, predicated upon the assumption that the plaintiff was a non-resident. We submit that this portion of the opinion cannot be deemed persuasive here. It stated that "Custody

---

[7] *Society for the Propagation of the Gospel v. New Haven*; 8 Wheaton 464, 21 U. S. 464.

The Sophie Rickmers, 45 F. (2d) 413 (S. D. N. Y.).

would be assumed by the alien property custodian" and that "Title, however, would be unchanged. . . ." (128 N. E. at 192.) This is sharply at variance with what this Court later held in *Cummings v. Deutsche Bank* (1936), 300 U. S. 115, 120, 57 S. Ct. 359, 362:

> "Alien enemy owners were divested of every right in respect of money and property seized and held by the Custodian under the Trading with the Enemy Act. (Citing cases.) The title acquired by the United States was absolute and unaffected by definition of duties and limitations upon the power of the Custodian or the Treasurer of the United States. . . . As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit."

In petitioner's brief no mention is made of the fact that the Custodian did not at any time during World War I vest any rights growing out of the treaty with Austria-Hungary, the treaty in question in *Techt v. Hughes, supra*. It may be assumed that he followed the advice of the then Secretary of State to the effect that the provisions of that treaty were not regarded as being in operation.[8]

---

[8] "The Secretary of State to the Alien Property Custodian (Palmer)

"Washington, September 10, 1918

"Sir: The Department acknowledges the receipt of your letter of August 30, 1918, in which you state that the question has arisen as to the present effectiveness of the treaties with Austria-Hungary and the various state composing the Germany Empire, 'which permits subjects of those states to take or hold real property in the United States', and request that the Department indicates the attitude it is disposed to adopt in regard to these treaties.

"The Department assumes that you refer to the provisions in Article 2 of the convention of 1848 with Austria-Hungary * * * and to the somewhat similar provisions in article 14 of the con-

The incongruity of attempting to effect a continuity of the Treaty of 1923 through the hostilities of World War II is, we believe, convincingly demonstrated in the decision of the Circuit Court in this case. Prior to World War I we had provisions in a treaty with Prussia[9] which conformed substantially to those of the Treaty of 1923 with Germany. Following World War I, while still in a state of war with Germany, Congress (July 2, 1921) passed a joint resolution (42 Stat. 105, 106) providing that property of German nationals seized or held by the United States on or after April 16, 1917, should be retained until disposed of by law. The Treaty of Berlin of 1921 expressly ratified and adopted the provisions of this joint resolution. In 1936 this Court held[10] that by reason of World War I, the joint resolution of Congress of July 2, 1921, and the Treaty of Berlin ratifying the resolutions

---

vention of 1828 with Prussia, to article 2 of the convention of 1845 with Bavaria, and to similar articles in conventions with other states of the German Empire which were regarded in force on the dates of our entrance into a state of war with Austria-Hungary and Germany, respectively.

"In reply to your inquiry as to the present effectiveness of these provisions of the treaties with Austria-Hungary and the various states composing the German Empire, you are informed that as to Austria-Hungary and Germany, the Department does not regard these provisions as now in operation.

"In this relation it may be pointed out that in the absence of applicable treaty provisions the right of an alien to take or hold real property by descent or purchase, or otherwise, in the United States, would, it appears, depend upon the law of the State or Territory in which the property may be situated.

"I am (etc.)

ROBERT LANSING".

For. Re. Supp. 2 (1918) p. 309; cited in VL. Hackworth, *Digest of International Law* (1943), p. 327, as contra to the dictum in *Techt v. Hughes*, *supra*.

[9]Treaty of 1928 with Prussia, 8 Stat. 378, 384.

[10]*Cummings v. Deutsche Bank*, 300 U. S. 115, 57 S. Ct. 359.

and the seizure of enemy property, the United States had become the absolute owner of this property. Thus, we think, the effect of the treaty with Prussia was determined to the clear understanding of all—and when the Treaty of 1923 was entered into it unquestionably was with full knowledge of what resulted from the former like treaty.

Judge Cardoza held in the *Techt* case (128 N. E. at 193) that "until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion." We think the political departments of the Government have here acted, and as to the property rights here involved the treaty provisions were repudiated and annulled—not necessarily by a state of war but by the Act of Congress and its effect as determined by this Court.

The same eventualities occurred in World War II. The Trading with the Enemy Act was further enforced by the First War Powers Act and implemented by executive directives and orders. Can it be said that there could have been any naive failure to understand the import or effect of the acts taken? Or can it be said that Germany had any illusions as to the survival of the 1923 treaty in the event of another conflict?

It is suggested by petitioner that the vesting power and its exercise do not disturb the alien's right to inherit (Pet. Br. pp. 18-20); that because certain movements of an heir might be licensed and the Custodian is authorized to represent the heir in legal proceedings, provision might be made for the enforcement of this right. The realistic answer is that nothing more than an empty shell could remain. The effect of vesting, as determined by this Court, has been shown. That the Custodian may not vest

in every case is beside the point. He might not even discover the facts in many instances. The test is not what is done but what can be done under the statute. As pointed out by the Circuit Court [R. 36, 37] numerous restrictions were imposed upon German nationals directly in conflict with the enjoyment of any rights which might have resulted from the treaty. The contention that rights of German nationals could be asserted suggests the nursery rhyme in which the daughter who asked her mother if she could go out to swim received an affirmative reply—but with the qualification that although she could hang her clothes on a hickory limb, she could not go near the water.

To urge the view that despite what eventuated following World War I and despite the greater implementation and enforcement of the Trading with the Enemy Act during World War II, the treaty provisions still remained effective and were to be regarded as operative, is to urge that all realism be abandoned. The treaty as it pertained to this subject became a dead letter. It was without effect on the date here involved.

This does not mean that such rights as were provided by the terms of the treaty may not again be set up. Upon the termination of war, nations are free to make entirely new contractual relationships. Former provisions may be reenacted or reestablished. But, we submit, they are thus treated as being *revived* rather than as having *survived* during the period of war.

We submit that the Treaty of 1923 with Germany was ineffective on June 6, 1942, and had no application in this case.

II.

Article IV of the Treaty of 1923 Does Not Govern Succession by German Nationals to Personal Property of Decedent Americans.

It is our contention that even had the Treaty of 1923 with Germany remained in effect, the provisions thereof do not confer any rights upon German nationals to succeed to a deceased American's personal property in this country.

While the *first* paragraph of Article IV of the Treaty of 1923, which relates to "real or other immovable property," employs the broad term "any person" in referring to the decedent, the *second* paragraph, relating to "personal property of every kind," contains an entirely different designation and provision. It reads as follows:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation or otherwise, and their heirs, legatees and donees of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

In the first place this provision is limited to "nationals," rather than applying to "any person." In the second place it defines the personal property which the national is given the right to dispose of in the manner provided, as that within the territory of the other. In the third place the personal property which the heirs, legatees and

donees are authorized to take can only be that which the national is empowered to dispose of. This is by reason of the designation thereof as "*such* personal property."

The plain meaning of the provision is that it (1) gives a national the right to dispose of his personal property which is situate in the other nation, and (2) gives his heirs, wherever resident and of whatever nationality, the right to take and dispose of that property, subject to such duties or charges as nationals of the country in which the property may be, would have to pay. This is the extent to which it goes. Petitioner agrees (Pet. Br. p. 35) that the provision does not relate to the right of a national to dispose of his personal property which is in his own country, since nationals naturally have that right without treaty provision. But as to the second clause, that which provides that the heirs of the national may take that property of his which is described in the first clause, petitioner seeks to invoke a construction which would give to the heirs of the national rights to property of the national which is not the subject of the first clause. In other words, he would so read the clause as to make it mean that heirs of German nationality and resident in Germany, could not only succeed to personal property of an American national which is in Germany, but to that which is in America as well.

However, we think it plain that the language employed says something else, and that an attempt is thus made to make it mean something it does not say. What it says, in plain words, is that the right of succession applies to "*such*" personal property, namely, that personal property of the national which is within the territory of the other nation. Had the intent been that sought to be imputed by petitioner, it would have been a simple matter to so provide.

The qualifying phrase "within the territories of the other" could readily have been omitted from the first clause—and it could have been added as a phrase modifying the words "personal property" in the second. This would have given an entirely different import, however. As it stands, "such personal property" refers to the personal property of a national which is within the territory of the nation of which he is not a national.

Petitioner states that two clauses were employed because provision was required for both the right of an alien to dispose of his property and the right to inherit his property. (Pet. Br. p. 34.) This being so, if the meaning contended for by petitioner had been intended the *droit d' aubaine* and the *droit de detraction* could readily have been treated in two entirely separate statements. The fact that provision as to both was made in one inclusive statement, with interlocking reference as to the qualifying phrase of definition, is, we believe, indication of an intent to specifically restrict the scope.

A substantial portion of petitioner's brief (Pet. Br. pp. 32-67) is devoted to reference to similar clauses which have been employed in treaties in the past. His contention is that it was the intent of these treaties to create reciprocity of inheritance in respect of personal property regardless of the nationality of the decedent. There is no inclination on our part to question any of the historical data so painstakingly presented by petitioner.

It is conceded by petitioner, however (Pet. Br. p. 38), that a construction contrary to the one suggested by him was adopted by this Court in *Frederickson v. Louisiana*, 23 How. 445, in which the Treaty of 1844 with Wurtemberg (8 Stat. 588, 590) was passed upon. In that case the testator was a citizen of the United States and his

cousins were citizens and residents of Wurtemberg. A succession tax of 10 per cent on legatees not domiciled in the United States was imposed by the Louisiana statute. (Sec. 7, Act 315, 1855, Acts La., pp. 398, 399.) The treaty provision involved was almost identical with Art. IV of the Treaty of 1923 with Germany. In passing upon the question as to whether the Treaty of 1844 with Wurtemburg prevented application of the tax to the alien legatees this Court held that the treaty was inapplicable to estates of citizens residing at home.

Three decisions of this Court have followed the holding in *Frederickson v. Louisiana, supra.*

Skarderud v. Tax Commission, 245 U. S. 633 (1917), involving Art. XVII, Treaty of 1827 with Norway (8 Stat. 346, 354);

Peterson v. Iowa, 245 U. S. 170 (1917), involving Art. VII, Treaty of 1826 with Denmark (8 Stat. 340, 342);

Duus v. Brown, 245 U. S. 176 (1917), involving Art. VI, Treaty of 1783 with Sweden (8 Stat. 346, 354).

There has been no later expression by this Court upon the question presented in the above cases.

It is petitioner's position that the *Frederickson v. Louisiana* decision is not to be followed here because the Court did not have before it the historical data presented by him relative to the treaty clause in question. However that may be, it remains to be explained why the Treaty of 1899 with Great Britain (31 Stat. 1939) or the Treaty of 1923 with Germany should have thereafter followed substantially the former language on this subject. While there may be no presumption as to knowledge, it would seem strange indeed for the treaty-making agencies of

our government to be unaware of the decisions of the Supreme Court in this field.

If petitioner's contentions as to the construction of Article IV of the Treaty of 1923 with Germany are not accepted, it naturally follows that reciprocity of inheritance rights as to personal property was not provided by the treaty. We submit that such was the result.

III.

The California Statute Is Valid and Does Not Invade the Federal Field of Control Over Foreign Relations.

The custodian contends that the California statute is "invalid as an invasion of the Federal field of control over foreign affairs." He speaks of the state's "seeking to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California," and characterizes the statute as an "invitation to foreign countries to trade inheritance rights abroad for inheritance rights here." (Pet. Br. p. 69.)

We think that a correct analysis of the statute and its effect will demonstrate that by its provisions the state becomes neither a promoter nor a trader, and that there is no intent to invade any Federal field. A more accurate statement of the question presented would be: "Does the California statute transgress any limitations on the power of states to regulate succession and testamentary disposition of property within its borders?"

There are certain basic principles of importance here which are well recognized. In *Irving Trust Co. v. Day*, 314 U. S. 556, the Supreme Court had this to say (at p. 562):

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. (Citing cases.)"

In *Lyeth v. Hoey*, 305 U.S. 188, the opinion of Mr. Chief Justice Hughes states as follows (at p. 193):

"Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. Mager v. Grima, 8 How. 490, 493; Maxwell v. Bugbee, 250 U. S. 525, 536. The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction. Uterhart v. United States, 240 U. S. 598, 603. The State establishes the procedure governing the probate of wills and the processes of administration. Petitioner's status as heir was thus determined by the law of Massachusetts. That law also regulated the procedure by which his rights as an heir could be vindicated."

It was held in *Terrace v. Thompson*, 263 U. S. 197, 217, that "each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders." (It is apparently conceded by the Custodian (Pet. Br. p. 71) that under this authority California may deny all aliens the right to inherit.)

We take it that the foregoing principles are not disputed. It is our contention that the state in this instance is but legislating in its acknowledged province, with full

recognition and deference being accorded to treaty provisions and with no attempt being made to assume any external powers, both the purpose and effect of its statute being merely to regulate succession in the state. The California statute, by making reciprocal rights its base, predicates its rule upon the treaty provisions made by the Federal Government.

When this case was presented before the Circuit Court of Appeals the petitioner characterized the California statute one of "retribution or confiscation"—and thus an offender as invading the domain of federal power over foreign affairs. That court found no justification for any such characterization. [R. 71.] It is now said that the statute makes of the state a promoter, which seeks by invitation to trade or to negotiate inheritance rights. We submit that inferences of this sort do not affect the judicial determination of the basic questions involved. Is the state legislating within its province? The answer to this is well established by *Irving Trust Co. v. Day, supra.* In so doing does it transgress its jurisdiction by invading the field of foreign relations? In answer to this the petitioner relies upon the decision in *Hines v. Davidowitz,* 312 U. S. 52.

With the soundness of the decision in the *Hines v. Davidowitz* case there need be no disagreement. That there are considerations here which were not applicable in that case involving the registration of aliens is self-evident. There the power to legislate was a concurrent one. The state could legislate in the exercise of its police power, and the Federal Government's power was not subject to question. In that case the state did not possess power as here, in a field recognized, in the absence of treaty provisions, as its exclusive province. There the Federal Government had

enacted "a complete scheme of regulation." It had acted, moreover, with a view to protecting the personal liberties of law-abiding citizens by affording secrecy to the information imparted upon registration,—a consideration important to foreign relations and one which was not respected in the provisions of the state statute. The Pennsylvania law impinged upon an over-all national policy, to which, although there had been a concurrent power to legislate, it must yield. Here we have no infringement of personal freedoms. We have a regulation of property rights within all acknowledged province. And, in the absence of treaty provisions, there is no other authority to legislate in this field.

In effect the state law but reaffirms and substantiates the treaty. No conflict of any kind can be pointed to. Nor can it be said, we submit, that the statute imposed any obstacle to complete Federal regulation in the field of foreign affairs.

Petitioner would have the state completely abolish all rights of aliens in those countries with which we have no treaty to inherit property here—rather than extend them such a right (and thereby enable our citizens to enjoy a like right) in those instances where those countries have adopted statutory provisions for reciprocal rights. This, he concedes, could be done,—but it is his contention that anything short of this would constitute an adventure in the field of foreign relationships. We think such a position results in a distortion of the effect of a state's legislation as to matters concerning which the state only has the power to legislate. It magnifies what is purely incidental.

We submit that the California statute does not bring about any invasion of the Federal field of foreign affairs.

IV.

The Burden of Proof of the Existence of Reciprocal Rights Is Upon the Custodian.

Petitioner claims that the Circuit Court erred in holding that the Custodian has the burden of proof. His contention is that the amendment of Section 259 of the California Probate Code controls. The California statute, both as enacted in 1941 and as amended in 1945, is contained in the Appendix hereto. [B and C, pp. 2 and 3.]

As originally enacted in 1941 the statute added three new sections to the Probate Code. Section 259 provided for the rights of nonresident aliens to take property by succession or testamentary disposition in California where reciprocal rights existed. Section 259.1 placed the burden of establishing the fact of existence of reciprocal rights upon the nonresident aliens. Section 259.2 provided that if reciprocal rights were not found to exist and if no heirs other than the aliens were found eligible to take, the property shall be disposed of as escheated property, *i. e.*, to the state.

By the amendment of 1945 (Chap. 1160, Stats. 1945) Sections 259.1 and 259.2 were repealed and Section 259 was amended by setting up a presumption that reciprocal rights exist and placing the burden of establishing the nonexistence of such rights upon the resident claimant. This amendment became effective on September 15, 1945, which was after the first decision of the Circuit Court in the instant case but before the decision of the United States Supreme Court of January 7, 1946, on the jurisdictional question. The judgment of the District Court was a summary judgment. (Opinion dated November 17, 1943.) (52 F. Supp. 850.)

The Custodian has not denied that he stands in the shoes of the nonresident alien legatees in this case. Whatever interest he could have acquired was that which these legatees may acquire. At the time the matter was submitted in the District Court the California statute required the nonresident aliens to establish the fact that reciprocal rights existed. This was never established.

Petitioner takes the position that the amended section is the one controlling and that, because a presumption that reciprocal rights is thereby provided, there is no burden upon him to establish this; that the burden is upon the other claimants to overcome the presumption by proving the nonexistence of reciprocal rights.

We submit that the Circuit Court was correct in treating the 1941 statute as controlling in this case. The stage at which such a change of procedural law could become effective in this case was passed long before the enactment of the amendment. Petitioner has cited no California case in which a changed procedural provision was invoked and held to govern where the stage at which the provision would have been operative had passed. The rule in California is to the contrary, as is well demonstrated by the decision in *Vanderbilt v. All Persons*, 163 Cal. 507, a case cited by the respondents. There, as here, the attempt was made to invoke a changed procedural provision after judgment; when the case was on appeal. At the time of trial of this quiet title action an abstract of title, made and certified after the public records had been destroyed by fire, was received in evidence, although at that time such evidence was not admissible. The California Code of Civil Procedure (Sec. 1855a) was afterwards, during pendency of the appeal, amended to permit

the introduction of such evidence. Answering the argument of respondent in that case that the amendment, being procedural, controlled and cured any error in the admission of this evidence, the California Supreme Court held that the changed law could not govern at that stage. The case of *Barnaby v. Barnaby*, 100 Cal. App. 195 is directly in point on this question,—the plaintiff there relying upon an amendment adopted during the pendency of the appeal to save her from the consequences of her failure to prove matters of which proof at the time of trial was required but as to which the amendment, made subsequently to the trial, permitted the court to take judicial notice. It was held that the amendment could not be invoked as effective at the appellate stage.

In the case here the Custodian chose to rely upon his claim that the California statute was unconstitutional, and offered no proof as to the existence of reciprocal rights of succession and testamentary disposition—although the burden was upon those in whose shoes he stood to establish this. As a consequence, reliance may not now be placed upon an amendment adopted after this stage of the case had passed.

In addition to this foreclosure of petitioner's claim we believe that there is another reason why he may not resort to the amended section 259 to escape the burden of proof. While respondents have not advanced the point, it appears to us that the 1945 statute went further than a procedural change. The revisions enacted partake of a substantive character. It is clear that they changed the reciprocal bases upon which the right to take property in California was extended to nonresident aliens. However, as this subject has not been argued by the parties here it may not be proper for us to inject it.

We submit that the Circuit Court's decision comports with California law and that the burden of proof was upon the Custodian.

Conclusion.

For the reasons herein expressed, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California;

EVERETT W. MATTOON,
Deputy Attorney General of the State of California,

Amici Curiae.

April 7, 1947.

APPENDIX.

A.

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

"Where on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality whether resident or nonresident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

B.

Section 259, 259.1 and 259.2 of the California Probate Code, as enacted by Chapter 895, California Statutes 1941, effective July 1, 1941, provide as follows:

"259. Aliens residing abroad: Dependence of rights upon reciprocity.

The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

"259.1. Same: Burden of establishing that rights are reciprocal. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

"259.2. Same: Disposition of property on finding of non-reciprocity. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

C.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes 1945, effective September 15, 1945, provides as follows (Sections 259.1 and 259.2 were repealed by this Chapter):

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the

court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

D.

Section 5(b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V. 5(b), provides in pertinent part as follows:

"(1) During the time of war or during any other period of national emergency declared by the President . . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . ."

SUPREME COURT OF THE UNITED STATES

No. 626.—October Term, 1946.

Tom C. Clark, Attorney General, as Successor to The Alien Property Custodian, Petitioner, *v.* Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 9, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Alvina Wagner, a resident of California, died in 1942, leaving real and personal property situate there. By a will dated December 23, 1941, and admitted to probate in a California court in 1942, she bequeathed her entire estate to four relatives who are nationals and residents of Germany. Six heirs-at-law, residents of California, filed a petition for determination of heirship in the probate proceedings claiming that the German nationals were ineligible as legatees under California law.[1]

There has never been a hearing on that petition. For in 1943 the Alien Property Custodian, to whose functions

[1] Section 259, California Probate Code, in 1942 provided:

"The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within

the Attorney General has recently succeeded,[2] vested in himself all right, title and interest of the German nationals in the estate of this decedent.[3] He thereupon instituted this action in the District Court against the executor under the will and the California heirs-at-law for a determination that they had no interest in the estate and that he was entitled to the entire net estate, after payment of administration and other expenses. The District Court granted judgment for the Custodian on the pleadings. 52 F. Supp. 850. The Circuit Court of Appeals reversed, holding that the District Court was without jurisdiction of the subject matter. 147 F. 2d 136. The case came here on certiorari. We held that the District Court had jurisdiction of the suit and remanded the cause to the Circuit Court of Appeals for consideration of the merits. 326 U. S. 490. The Circuit Court of Appeals thereupon held for respondents. 156 F. 2d 653. The case is here again on a petition for a writ of certiorari which we granted because the issues raised are of national importance.

First. Our problem starts with the Treaty of Friendship, Commerce and Consular Rights with Germany,

---

the United States or its territories money originating from the estates of persons dying within such foreign countries."

Section 259.2 provided:

"If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

The condition with respect to receipt of moneys in the United States was repealed in 1945, while this case was pending. Cal. Stats. 1945, c. 1160, § 1, effective September 15, 1945. Under the original act, the non-resident aliens had the burden of establishing the fact of existence of the reciprocal rights. § 259.1. By the 1945 amendment the burden of establishing the non-existence of such reciprocal right was placed on him who challenged the right of the non-resident aliens to take. Section 259.2 was repealed.

[2] Exec. Order No. 9788, Oct. 15, 1946, 11 Fed. Reg. 11981.

[3] Vesting Order No. 762, 8 Fed. Reg. 1252.

signed December 8, 1923, and proclaimed October 14, 1925. 44 Stat. 2132. It has different provisions governing the testamentary disposition of realty and personalty, which we will treat separately. The one pertaining to realty, contained in Article IV, reads as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of "any person" holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Techt* v. *Hughes*, 229 N. Y. 222, 240, 128 N. E. 185, 191; *Ahrens* v. *Ahrens*, 144 Ia. 486, 489, 123 N. W. 164, 166. And see *People* v. *Gerke*, 5 Cal. 381; *Scharpf* v. *Schmidt*, 172 Ill. 255, 50 N. E. 182; *Colson* v. *Carlson*, 116 Kan. 593, 227 P. 360; *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13.

If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them. *Hauenstein* v. *Lynham*, 100 U. S. 483, 488–490.

Second. The Circuit Court of Appeals concluded that these provisions of the treaty had been abrogated. It relied for that conclusion on the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.*, as amended by the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. Supp. I, § 5, and the Treaty of Berlin, 42 Stat. 1939.

We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 494–495. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth* v. *United States*, 279 U. S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt* v. *Hughes*, *supra*, and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows:

> "The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have

done. . . . President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *United States*, 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 N. Y. pp. 242–243.

To the same effect see *Goos* v. *Brocks*, *supra*; *State* v. *Reardon*, 120 Kan. 614, 245 P. 158.[4]

We do not think that the national policy expressed in the Trading with the Enemy Act, as amended, is incompatible with the right of inheritance granted German aliens under Article IV of the treaty. It is true that since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German nationals into this

[4] For a recent review of the authorities see Lenoir, The Effect of War on Bilateral Treaties, 34 Geo. L. J. 129.

country,[5] have outlawed communications or transactions of a commercial character with them,[6] and have precluded the removal of money or property from this country for their use or account.[7] We assume that these provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed.[8] But the Act and the Executive Orders do not evince such hostility to ownership of property by alien enemies as to imply that its acquisition conflicts with the national policy. There is, indeed, tacit recognition that acquisition of property by inheritance is compatible with the scheme of the Act. For the custodian is expressly empowered to represent the alien enemy heir in all legal proceedings, including those incident to succession.[9] Much reliance for the contrary view is placed on the power to vest alien property in an agency of the United States.[10] But the power to vest, *i. e.*, to take away, what may be owned or acquired does not reveal a policy at odds with the reciprocal right to inherit granted by Article

[5] § 3 (b).

[6] § 3 (a).

[7] § 7 (c); § 5 (b), as amended; Exec. Order No. 8785, 3 C. F. R. Cum. Supp. 948.

[8] § 5 (a).

[9] Exec. Order No. 9193, ¶ 5, 3 C. F. R. Cum. Supp. 1174, 1176.

[10] Section 5 (b) (1), as amended, provides in part:

"During the time of war or during any other period of national emergency declared by the President . . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. . . ."

IV of the treaty. For the power to vest is discretionary not mandatory. The loss of the inheritance by vesting is, therefore, not inevitable. But more important, vesting does not necessarily deprive the alien enemy of all the benefits of his inheritance. If he owes money to American creditors, the property will be applied to the payment of his debts.[11]

To give the power to vest the effect which respondents urge would, indeed, prove too much. That power is not restricted to property of alien enemies. It extends to the property of nationals of any foreign country, friend or enemy.[12] Provisions comparable to that contained in Article IV of the present treaty are found in existing treaties with friendly nations.[13] We will not readily assume that when Congress enacted § 5 (b) and authorized the vesting of property, it had a purpose to abrogate all such treaty clauses. Cf. *Cook* v. *United States*, 288 U. S. 102, 120. Yet if the power to vest is inconsistent with the right of inheritance of an alien enemy, it is difficult to see why it is any less so when other aliens are involved. Finally, there is a distinction between the acquisition of property and the use thereof which § 5 (b) itself recognizes. That section not only grants the President the power to vest; it likewise grants him authority under the same circumstances to "prevent or prohibit, any acquisition . . . of . . . any property in which any foreign country or a national thereof has any interest." § 5 (b) (1) (B). No action has been taken to prevent or prohibit the acquisition of property by inheritance on the part of enemy aliens. The grant of express power to cut off, *inter alia*, the right of inheritance and the non-exercise of the power lend support to the view that the Trading with the Enemy

[11] Pub. L. No. 671, 79th Cong., 2d Sess., adding § 34 to the Trading with the Enemy Act.

[12] See note 10, *supra*.

[13] Treaty with Great Britain, Art. I, II, March 2, 1899, 31 Stat. 1939. Treaty with Norway, Art. IV, June 5, 1928, 47 Stat. 2135, 2138.

Act, as amended, did not without more suspend or abrogate Article IV of the present treaty. This conclusion squares with the general rule stated in *Karnuth* v. *United States*, *supra*, p. 237, that treaty provisions "giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" survive the outbreak of war.

The argument based on the Treaty of Berlin is inconclusive. The Joint Resolution of July 2, 1921, 42 Stat. 105, 106, declared that property of German nationals held by the United States should be retained and no disposition made of it, except as specifically provided by law, until the German government made suitable provision for the satisfaction of claims of American nationals against it. Thus absolute title to the property in question became vested in the United States. *Cummings* v. *Deutsche Bank*, 300 U. S. 115. The Treaty of Berlin accorded the United States all rights and advantages specified in the resolution. But the Treaty of 1828 with Prussia contained a provision substantially similar to Article IV of the present treaty. 8 Stat. 378, 384, Art. XIV. Hence it is argued that if the Treaty of 1828 survived the outbreak of war and thus guaranteed property rights in German nationals by way of inheritance during that war, it would not have been necessary to have negotiated a new convention covering the same ground in 1923. And it is also argued that if the provision in the earlier treaty did not survive the war, it is unlikely that the same parties would intend like provisions in the later treaty to have a different effect.

The attitude of the State Department has varied. In 1918 Secretary Lansing expressed the view that such treaty provisions were not in force during the war with Germany and Austria.[14] Today the Department apparently takes

[14] U. S. Foreign Rel.: 1918 Supp. 2, p. 309 (Dept. State 1933); VI Hackworth, Digest of International Law (1943) p. 327.

the other view.[15] We have no reliable evidence of the intention of the high contracting parties outside the words of the present treaty. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty. Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine, as *Techt* v. *Hughes, supra,* indicates, whether the provision under which rights are asserted is incompatible with national policy in time of war. So far as the right of inheritance of realty under Article IV of the present treaty is concerned, we find no incompatibility with national policy, for reasons already given.

It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden* v. *Ames,* 184 U. S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. The Allied Control Council has, indeed, assumed control of Germany's foreign affairs and treaty obligations[16]—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.

[15] Letter to the Attorney General from Acting Secretary of State, Joseph C. Grew, dated May 21, 1945, commenting on the Government's position in the present litigation.

[16] The Axis in Defeat, State Dept. Pub. No. 2423, pp. 71, 72, 77.

Third. The problem of the personalty raises distinct questions. Article IV of the treaty contains the following provision pertaining to it:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

A practically identical provision of the Treaty of 1844 with Wurttemberg, Art. III, 8 Stat. 588, 590, was before the Court in *Frederickson* v. *Louisiana*, 23 How. 445. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the "case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other . . ." pp. 447–448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. *Petersen* v. *Iowa*, 245 U. S. 170; *Duus* v. *Brown*, 245 U. S. 176; *Skarderud* v. *Tax Commission*, 245 U. S. 633.

The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes "any person"; and the property covered is that within the territory of either of

the high contracting parties. In case of personalty, the provision governs the right of "nationals" of either contracting party to dispose of their property within the territory of the "other" contracting party; and it is "such personal property" that the "heirs, legatees and donees" are entitled to take.

Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson* v. *Louisiana, supra,* and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1880 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. We do not know from the present record the nationality of Alvina Wagner. But since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption less favorable to it, viz., that she was an American citizen.

Fourth. It is argued, however, that even though the provision of the treaty is inapplicable, the personalty may not be disposed of pursuant to the California statute because that statute is unconstitutional. Issues under the Fourteenth Amendment are not raised as in *Terrace* v. *Thompson,* 263 U. S. 197. The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. That argument is

based on the fact that under the statute the right of nonresident aliens to take by succession or testamentary disposition is dependent upon the existence of a reciprocal right on the part of citizens of the United States to take personalty on the same terms and conditions as residents and citizens of the other nation.[17] The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

In *Blythe* v. *Hinckley*, 180 U. S. 333, California had granted aliens an unqualified right to inherit property within its borders. The alien claimant was a citizen of Great Britain with whom the United States had no treaty providing for inheritance by aliens in this country. The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The Court rejected the argument as being an extraordinary one. The objection to the present statute is equally far fetched.

Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham*, *supra*. Then the state policy must give way. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52. But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316–17, or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution. What Cali-

[17] See note 1, *supra*.

fornia has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

In summary, we hold that disposition of the realty is governed by Article IV of the treaty. Disposition of the personalty, however, is not governed by the treaty unless it is determined that Alvina Wagner was a German national. If she was an American citizen, disposition of the personalty is governed by California law. Whether there are other requirements of the California statute which would bar the California heirs-at-law is a question on which we intimate no opinion.

The judgment is reversed in part and affirmed in part, and the cause is remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 626.—October Term, 1946.

Tom C. Clark, Attorney General, as Successor to The Alien Property Custodian, Petitioner,

v.

Alvina Allen, Gertrude Dinwiddie, Hilda Pigozzi, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 9, 1947.]

Mr. Justice Rutledge, concurring in part.

I join in the Court's opinion insofar as it relates to the real estate. But, as to the personal property, I think the cause should be remanded to the District Court for determination of Alvina Wagner's nationality, without expression of opinion here upon the constitutionality of the California statute.

The decision now made on that issue, by virtue of the Court's hypothesizing that she was an American citizen, will be rendered both moot and advisory in character if it is found, as it may well be in the District Court's further proceedings, that she was a German national. This Court has consistently declined to decide constitutional questions on hypothetical presentations. *Rescue Army* v. *Municipal Court*, 331 U. S. ——. The practice should be followed in this case, even though conceivably another appeal might be saved by indulging the presumption which the Court makes. It is more important that constitutional decisions be reserved until the issues calling for them are squarely and inescapably presented, factually as well as legally, than it is to expedite the termination of litigation or the procedural convenience of the parties.